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No. 04-144

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
NORFOLK SOUTHERN RAILWAY CO., AND
NORFOLK SOUTHERN CORPORATION,

Petitioners,

v.

SHIRLEY ANDERSON,

Respondent.

On Petition for a Writ of Certiorari To The Court Of Appeals Of Ohio, Eighth Appellate District, Cuyahoga County

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a general release executed by a plaintiff with advice of counsel to compromise a claim for asbestos-related injury is invalid under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 55, thus allowing survival and wrongful death claims for asbestos-related cancer to be brought even though they are expressly covered in the release.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, American Financial Group, Incorporated, was a party to the proceedings in the court below.

RULE 29.6 STATEMENT

Petitioner Norfolk & Western Railway Company no longer exists as a separate entity and has been merged into petitioner Norfolk Southern Railway Company, the parent of which is petitioner Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of Norfolk Southern Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Norfolk & Western Railway Company, Norfolk Southern Railway Company, and Norfolk Southern Corporation (collectively "Norfolk Southern") respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is reported at 797 N.E. 2d 537 (Ohio Ct. App. 2003), and is reproduced in the Petition Appendix ("App.") at 1a-15a. The orders of the trial court are not reported, and are reproduced at App. 16a-19a.

JURISDICTION

The Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, entered judgment on September 18, 2003. The Supreme Court of Ohio denied a timely petition for discretionary appeal on March 3, 2004, App. 21a, and denied a timely petition for reconsideration on April 28, 2004, App. 20a. This Court has jurisdiction under 28 U.S.C. § 1257 and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act ("FELA"), ch. 149, 35 Stat. 65 (1908) (codified as amended, 45 U.S.C. § 51 et seq.), are reproduced at App. 22a-24a.

STATEMENT OF THE CASE

In this case, respondent Shirley Anderson and her husband Lester Anderson, a former railroad employee who had last worked for the railroad in 1963, brought suit in 1984 against

petitioners and other defendants seeking damages for Mr. Anderson's asbestosis and other asbestos-related injury. In 1986, with the advice of counsel, the Andersons negotiated an agreement with petitioners settling their claims and executed a general release, which expressly included any future claims relating to any asbestos-related cancer (including mesothelioma) that Mr. Anderson might later develop. It is undisputed that in 1986 the Andersons knew that, given Mr. Anderson's existing asbestosis, he was at risk of contracting mesothelioma.[1] Although mesothelioma claims were expressly covered in the general release, respondent in 2000 brought wrongful death and survival actions for mesothelioma against Norfolk Southern. The state appellate court below permitted the actions to go forward, holding that the general release was invalid under Section 5 of FELA, which voids any contract to the extent it exempts a carrier from liability under the Act, 45 U.S.C. § 55, because the mesothelioma claims had not accrued at the time the release was executed. App. 13a.

The ruling below is in flat conflict with this Court's decisions in *Mellon* v. *Goodyear*, 277 U.S. 355 (1928), and *Callen* v. *Pennsylvania Railroad*, 332 U.S. 625 (1948). Those decisions establish that general releases that are executed after the alleged wrongful act in settlement of a claim do not offend FELA's prohibition against liability exemptions, even if the cause of action has not yet accrued. Moreover, there is now a mature and acknowledged 2-1 split in the federal courts of appeals, with multiple state appellate courts on both sides of the divide. The court below joins the Sixth Circuit in holding that the only valid release under section 5 of FELA is a release of a "known claim for a

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[1] Asbestosis is a noncancerous scarring of the lungs caused by breathing asbestos fibers. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 142 n.2 (2003). Mesothelioma is a rare cancer of the lining of the stomach or lung typically associated with high levels of asbestos exposure (as is asbestosis). *Id.* at 142.

specific injury." *Babbitt* v. *Norfolk & W. Ry.*, 104 F.3d 89, 93 (6th Cir. 1997); App. 11a. By contrast, the Third Circuit, explicitly declining to follow the Sixth Circuit, has held that a FELA plaintiff may in compromise of an existing claim execute a release of future unaccrued claims, so long as it is known at the time that the plaintiff was at risk of developing diseases covered by the release. *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 702 (3d Cir. 1998). The Eleventh Circuit follows the same rule as the Third Circuit. *Sea-Land Serv., Inc.* v. *Sellan*, 231 F.3d 848, 852 (11th Cir. 2000). Under the *Wicker* rule, Norfolk Southern would have prevailed below.

This Court is vigilant to resolve conflicts under FELA because a "uniform application" of the statute "throughout the country is essential to effectuate its purposes." *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952).[2] This Court's intervention is especially critical as litigants and the courts continue to grapple with the behemoth of asbestos litigation. Asbestos-related claims, particularly by plaintiffs with noncancerous injuries and minimal impairment, are choking the courts. Because trial of the hundreds of thousands of asbestos claims in the nation's courts is impossible, the vast majority of asbestos claims that have been resolved have been settled. Railroads, including Norfolk Southern, typically have paid a higher settlement value for noncancerous claims than those claims would command in

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[2] *See also South Buffalo Ry.* v. *Ahern*, 344 U.S. 367, 370 (1953) (Congress "intended" FELA to be a "uniform scheme"); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942) ("[FELA] requires uniform interpretation"). Congress also addressed the importance of uniformity:

> A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States.

H.R. Rep. No. 60-1386, at 3 (1908).

their own right (given that the proof of injury and causation is difficult for noncancerous conditions and damages often are minimal), and have received, in return, a release of future asbestos-related claims (including claims for asbestos-related cancer). Plaintiffs have been willing to execute these releases because only a small percentage actually develop asbestos-related cancer, and because they retain their right to sue other defendants (such as asbestos manufacturers) notwithstanding the release negotiated with the railroad.

The rule adopted below casts thousands (and perhaps tens of thousands) of existing FELA settlements into doubt and invites forum shopping; plaintiffs who develop mesothelioma or any other asbestos-related disease that was not manifest at the time of the release will bring their claims in favorable circuits under the liberal venue rules of FELA. Moreover, the state appellate court's ruling injects tremendous uncertainty into the settlement process prospectively. Railroads will not continue to pay substantial settlements for releases of uncertain validity. Disincentives for settlement will only exacerbate the asbestos litigation crisis that this Court has decried. Accordingly, this Court should vindicate the rule of *Callen* and *Mellon*. But, at a minimum, this Court must establish a clear national rule on which the parties can rely in settling asbestos and other occupational exposure claims under FELA.

A. Statutory Background

Section 5 of FELA states that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void." 45 U.S.C. § 55.[3] Federal law governs the validity of

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[3] Section 1 of FELA makes "[e]very common carrier by railroad . . . liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Absent an express statutory departure, the

releases under FELA. *Dice*, 342 U.S. at 361. The party attacking the release bears the burden of showing that the release is invalid. *Callen*, 332 U.S. at 629-30. Section 6 provides concurrent jurisdiction for the federal district courts and state courts. 45 U.S.C. § 56.

In 1908, FELA "was enacted because Congress was dissatisfied with the common-law duty of the master to his servant." *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 507 (1957). The traditional common law rules made it difficult for railroad workers to recover for injuries sustained on the job, and the various states applied inconsistent tort law rules. Accordingly, FELA modified the common law and established a uniform national standard. For example, the Act abolished certain common-law defenses, and, in Section 5, sought to prevent employers from contracting out of liability with their workers. See S. Rep. No. 60-460, at 2-3 (1908). Section 5 was aimed at the practice whereby railroads "insisted on a contract with their employees, discharging the company from liability for personal injuries." H.R. Rep. 60-1386, at 6 (1908).

B. Factual Background

This cases arises out of personal injuries sustained by Lester Anderson that, according to the allegations in the complaint, were a result of his alleged exposure to asbestos while an employee of the railroad and its predecessors. From 1940 until 1961, Lester Anderson was employed as a locomotive mechanic by the Nickel Plate Railway Company, save for service in the United States Navy from 1944 to 1946. From 1961 through 1963, Lester Anderson was employed by the New York Central Railroad Company as a sheet metal and maintenance worker.

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requisite elements of a FELA cause of action are determined by the common law "'as established and applied in the federal courts.'" *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949).

More than 20 years after Mr. Anderson's employment at the railroads had ended, he and respondent Shirley Anderson, his wife, filed their first action against petitioners as well as against various asbestos manufacturers on November 20, 1984, seeking compensation for personal injuries purportedly sustained by Mr. Anderson as a result of his exposure to asbestos while an employee of the railroad and its predecessors. That case was captioned, *Lester Anderson, et al.* v. *Norfolk & Western Railway Co., et al.*, Case No. CV-84-83441 (Cuyahoga County Ct. Com. Pl., Nov. 20, 1984).

On March 26, 1986, with the advice and consent of counsel and in consideration for receiving settlement funds in the amount of $50,000, Mr. and Mrs. Anderson both executed a covenant not to sue and to cease suing the railroad defendants ("release" or "covenant"). The covenant specifically provided that "this agreement . . . constitutes a compromise in settlement of a disputed claim." App. 26a-27a. The covenant included a general release of claims against the railroads and their successors arising from Mr. Anderson's past railroad employment, *id.* at 25a-26a, and specifically included the following:

> IT IS FURTHER AGREED AND UNDERSTOOD without any limitation on the foregoing that this agreement includes on behalf of LESTER ANDERSON, his successors and assigns any claim, demand, right or cause of action for injuries, losses and damages resulting from or relating in any manner to exposure to or ingestion of any substance whatsoever including but not limited to asbestos dust or fiber and any diseases resulting therefrom as well as asbestosis or asbestos-related disease, illness or injury including any and all forms of cancer or mesothelioma, claimed to be related to asbestos or any other substances whether or not presently alleged or manifested.

Id. at 27a.

When the Andersons signed the release, with the advice and consent of counsel on March 26, 1986, Lester Anderson had asbestosis and was aware of his potential risk of developing mesothelioma.[4] He received valid consideration to release his risk for developing mesothelioma. The railroad did not offer $50,000 simply to settle Mr. Anderson's claim for asbestosis. Thus, the covenant not only terminated the 1984 action against the railroads and disposed of Mr. Anderson's existing claim for asbestosis and other bodily injuries, but also disposed of any future claims of either Mr. Anderson or his heirs, including his wife, for any asbestos-related injury against the railroad, specifically including any claims for mesothelioma.

Mr. Anderson contracted mesothelioma and died in 1998. Notwithstanding the release she had signed, respondent Shirley Anderson, individually and in her capacity as the Executrix of the Estate of Lester Anderson, filed this FELA action against petitioners on March 29, 2000. In particular, Mrs. Anderson alleged both a wrongful death and survival claim against petitioners on the grounds that Mr. Anderson's mesothelioma was caused in part by asbestos exposure during his railroad employment.

Petitioners filed for summary judgment in December 2001, arguing that they were entitled to judgment as a matter of law

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[4] This is reflected in Mr. Anderson's answer to Interrogatory No. 57 in the 1984 lawsuit:

> (a) Plaintiff has experienced chronic cough and constant phlegm in the chest, among other problems which have made the performance of many activities more difficult. Additionally, Plaintiff has become nervous and depressed due to his asbestos exposure and *the potential risk of contracting other lung diseases and cancer.*

Mot. for Summ. J. App. E at 37 (emphasis added). Moreover, Mr. Anderson was under the care of a physician, Dr. Pr. Paul Venizelos, who contemporaneously had opined that individuals exposed to asbestos had an increased chance of developing lung cancer and mesothelioma. *See id.* App. F at 39, 52-54.

based upon the prior executed release. On October 3, 2002, the trial court determined that the release precluded the survival claim as a matter of law, but the trial court permitted the wrongful-death claim to go forward. App. 18a.

Despite the order of the trial court barring the survival claim, on January 6, 2003, respondent filed a motion to allow evidence of the survival claim and damages to be presented at trial. In denying that motion, on January 7, 2003, the trial court stated:

> The Court after oral arguments and briefs found that the Plaintiff's survival claims were extinguished by a release executed by Lester Anderson on March 26, 1986. *The Court finds that the release was signed after consulting with counsel and Plaintiff's awareness of the potential risks of contracting other lung diseases and cancer.* Plaintiff's motion to allow evidence of Lester Anderson's survival claim and damages . . . is denied. Judgment for Defendants.
>
> Final. There is no just reason for delay.

App. 16a (emphasis added).

From this judgment, counsel for Mrs. Anderson instituted an appeal as of right to the Court of Appeals of Ohio, Eighth Appellate District challenging the trial court's grant of summary judgment in favor of petitioners on the survival claim. In turn, petitioners filed a cross-appeal seeking review of the trial court's ruling that the wrongful death claim was not barred by the release. The appeals were consolidated.

C. Proceedings in the Court Below

The Ohio Court of Appeals affirmed the trial court's order denying petitioners summary judgment on respondent's wrongful death claim and reversed the trial court's order granting petitioners summary judgement on the survival claim. App. 1a-15a. The court held that the release is void to the extent that it applied to the mesothelioma claim because

that claim was unaccrued and unknown at the time the release was executed. "[U]nder FELA, a release is valid only where it disposes of an accrued claim for a known injury." *Id.* at 12a.

The court acknowledged that in *Callen* this Court had upheld the validity of general liability releases executed after the wrongful act under section 5 of FELA. App. 8a-9a ("'The [*Callen*] Court noted that the release was "not a device to exempt from liability but a means of compromising a claimed liability" . . . .'") (quoting *Callen*, 332 U.S. at 631)). Nonetheless, the court of appeals noted that "*[a]lthough the majority of courts have not so found,* 'the Sixth Circuit has adopted a bright-line rule that a release may be valid only with regard to injuries that are known at the time the release is executed.'" *Id.* at 13a (emphasis added) (quoting *Loyal* v. *Norfolk S. Corp.*, 507 S.E.2d 499, 502 n.4 (Ga. Ct. App. 1998)). The state appellate court adopted that minority rule, holding that "'[t]o be valid, a release must reflect a bargained-for settlement of a known claim for a specific injury.'" *Id.* at 11a (emphasis omitted) (quoting *Babbitt*, 104 F.3d at 93). The court of appeals explicitly declined to follow the Third Circuit's rule in *Wicker* allowing releases for "'risks which are known.'" *Id.* at 12a. Applying the *Babbitt* rule, the court reasoned that "because [Mr. Anderson] did not have mesothelioma when he signed the release, his claim had not yet accrued and, therefore, he could not release it." *Id.* at 13a.[5]

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[5] The court also relied on the flawed reading of *Callen* in *Fannin* v. *Norfolk & Western Railway*, 666 N.E. 2d 291 (Ohio Ct. App. 1995), to support the narrow construction. According to *Fannin*,

> "[w]hile such language [in *Callen*] seems to indicate that parties may indeed settle FELA claims via a release, it is clear that this only applies to claims which have already arisen *at the time the release is signed*; the release is valid only 'where controversies exist,' i.e., where it disposes of an accrued FELA claim."

App. 11a-12a (quoting *Fannin*, 666 N.E.2d at 295).

In so doing, the court cast aside the specific language of the release relating to asbestos-related illnesses, including mesothelioma, and found it significant that the general release contained broad language. The court surmised, "it is apparent from the plain language of the release that the intent of the release was to exempt appellees from all potential liability related to Lester Anderson's employment." App. 10a.

The court also took refuge in Justice Kennedy's discussion in *Norfolk & Western Railway* v. *Ayers*, 538 U.S. 135 (2003), of the separate-disease rule, which provides that a claim for asbestos-related cancer does not accrue until the cancer is manifest, and may be brought even if the plaintiff has previously filed claims for other asbestos-related diseases. App. 14a (citing *Ayers*, 538 U.S. at 174 (Kennedy, J., concurring in part and dissenting in part)). Thus, the state appellate court concluded that, notwithstanding the explicit release of future mesothelioma claims, "settlement of the asbestosis claim does not bar her subsequent recovery for a mesothelioma claim." *Id.* at 15a.

Subsequently, in a 4 to 3 decision, the Supreme Court of Ohio denied a timely petition for discretionary appeal on March 3, 2004, and a timely petition for reconsideration on April 28, 2004. The Ohio Court of Appeals affirmation of the trial court's order denying petitioners summary judgment on respondent's wrongful death claim and reversal of the trial court's order granting petitioners summary judgment on the survival claim constitutes a final decision under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Under *Cox*'s fourth category of effectively final judgments under 28 U.S.C. § 1257, federal issues may be reviewed by this Court when the federal issue has been finally decided by the state court, and when, despite further proceedings to come, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state

proceedings still to come." 420 U.S. at 482-83. The validity of releases under FELA has been finally decided by the state court below. Reversal by this Court would be preclusive of the respondents' causes of action, rather than controlling the scope or character of their adjudication (and would spare the waste of state judicial resources). Moreover, "a refusal immediately to review the state-court decision might seriously erode federal policy," *id.* at 483, because of the state court's break from the rule of *Mellon* and *Callen* and the negative effects of the ruling below on the efficient resolution of FELA asbestos-injury claims. See *id.*; *infra* at 21-24. Indeed, this Court has regarded a state court decision on the validity of an agreement under section 5 as final notwithstanding proceedings to come on remand. *Boyd* v. *Grand Trunk W. R.R.*, 338 U.S. 263 (1949) (per curiam) (reviewing agreement to restrict venue).

REASONS FOR GRANTING THE PETITION

"[T]he scope of § 5 is of fundamental importance in the administration of the Federal Employers' Liability Act . . . ." *Duncan* v. *Thompson*, 315 U.S. 1, 5 (1942). The decision below directly conflicts with this Court's precedents applying section 5 to settlement agreements, and exacerbates an already mature and acknowledged conflict in the circuits. This Court's review is necessary to re-establish that a general release of all claims made with advice of counsel and in good faith as part of a settlement agreement that is executed after the alleged wrongful act is committed does not offend FELA's prohibition against liability exemptions.

Moreover, review is especially critical given the importance of settlements in managing the asbestos litigation crisis. The incentive to settle claims and "buy their peace" when actual injury may be unknown is consistent with FELA's goals of fair compensation for injured workers. By invalidating the release in this case, the lower court has called into question thousands of FELA asbestos settlements reached with

employees that include the release of future claims, and has injected substantial uncertainty into the settlement process. In sum, this Court's review of the question presented here is imperative.

I. THE RULING BELOW DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENTS ESTABLISHING THE VALIDITY OF GENERAL RELEASES IN FELA SETTLEMENTS.

Long ago this Court established the validity of general releases under section 5 of FELA for future, unaccrued causes of action. In *Callen* v. *Pennsylvania Railroad*, the Court explained that a general release of all future claims executed after the alleged wrongful act is committed does not offend FELA's prohibition of liability exemptions. 332 U.S. 625, 630-31 (1948). Coupled with this Court's decision in *Mellon* v. *Goodyear*, such a release may include unaccrued causes of action resulting from the same wrongful act. 277 U.S. 335 (1928). The Ohio Appeals Court misconstrued *Callen* and ignored *Mellon*.

In *Callen* the plaintiff-employee sustained a back injury while working and entered into a settlement agreement with the employer-railroad. 332 U.S. at 626-27. For consideration (of $250) the plaintiff executed a general release of his claims arising out of the accident which caused the back injury (for "'all claims and demands which [plaintiff] have or can or may have against [the railroad].'") *Id.* at 626. Significantly, at the time the plaintiff executed the general release, he had not been diagnosed with, and was *unaware* that he had sustained, a permanent back injury. *Id.* at 627.

Subsequently, when plaintiff sought damages under FELA for a severe and permanent back injury, this Court upheld the general release. In rejecting the plaintiff's argument that the release "violates § 5 of the Federal Employers' Liability Act[,]" *id.* at 630, the Court stated:

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Id. at 631. Moreover, the Court explained that "until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others." *Id.* at 630. The fact that the employee did not know he had a permanent back injury was irrelevant to the validity of the release. As such, *Callen* makes clear that where there is a specific injury claim, a bona fide compromise of that claim – including a release of all future claims known or unknown – the release is valid under FELA.

The state appellate court below found that *Callen* did not save the release here because Mr. Anderson's mesothelioma had not manifested itself at the time of the settlement agreement, and thus his mesothelioma claim had not accrued. App. 13a. And because Mr. Anderson's mesothelioma claim had not yet accrued in 1986, the state court reasoned, "therefore, he could not release it." *Id.* But that reasoning runs directly afoul of *Mellon* v. *Goodyear*, 277 U.S. 335 (1928). In *Mellon*, this Court held that a general release of all future claims may bar unaccrued causes of action for the same wrongful conduct. The lower court simply ignored this decision.

In *Mellon*, the plaintiff-employee sustained personal injuries and, after bringing a FELA claim, settled with his employer for those specific injuries. For consideration he executed a general release "'for all claims and demands for all damages resulting from the injuries'" that may have been brought by him or his estate. *Id.* at 337. Subsequent to executing the release, the employee died, and his widow brought a wrongful death claim under FELA. *Id.*

The Court held that the release barred the subsequent, "unaccrued" wrongful death claim because the claim was based upon the same alleged tortious conduct for which the railroad had been released. According to the Court:

> By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury. A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act.

Id. at 344. The Court further explained:

> "The position taken by the courts is fairly summed up as follows: 'Whether the right of action is a transmitted right or an original right, whether it be created by a survival statute or by a statute creating an independent right, *the general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act*, and that for such wrongful act but one recovery should be had, and that if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts, no further right of action existed.'"

Id. at 345 (quoting *Strode* v. *Transit Co.*, 95 S.W. 851, 856 (Mo. 1906)). Thus, according to *Mellon*, the unaccrued claim of wrongful death was covered by the general release, as it applied to the same alleged wrongful act as in the previous lawsuit and settlement.[6]

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[6] *See also Gilmore* v. *Southern Ry.*, 229 F. Supp. 198 (E.D. La. 1964). In relying on *Mellon* to dismiss a wrongful death claim, the court agreed that "there is no right of action on the part of the heirs or widow of the decedent since any claim that he had or may have had was clearly

This rule escaped the lower court. Following the *Babbitt* decision of the Sixth Circuit, the Ohio court limited the coverage the general release to *known* and *accrued* claims, despite the fact that the subsequent mesothelioma claim stems from the same alleged wrongful act, namely negligent exposure to asbestos, as the settled asbestosis claim.

The lower court found it significant that asbestosis and mesothelioma are "separate and distinct diseases that give rise to separate and distinct causes of action under FELA." App. 12a. But the separate-disease rule has no effect on the power of a plaintiff to execute a valid release of unaccrued claims under *Mellon*, which depends only on whether the future claim concerns the same "wrongful act" as the claim currently in dispute. 277 U.S. at 345. The separate-disease rule simply "allows a person who has recovered for injuries resulting from asbestosis to bring a new lawsuit – notwithstanding the traditional common-law proscription against splitting a cause of action – if cancer develops." *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 174 (2003) (Kennedy, J., concurring in part and dissenting in part); *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 120-21 (D.C. Cir. 1982) (Ginsburg, J.) (noting that the separate-disease rule is a policy-based rule for applying the statute of limitations, based on weighing considerations of repose against countervailing considerations of evidentiary accuracy, fairness, and deterrence of premature lawsuits). In relaxing the single-action rule as a matter of policy, the separate-disease rule does not presuppose that there are separate torts, or even separate "injury" under FELA, when an asbestotic employee subsequently develops mesothelioma. "Injury" in tort law is an "invasion of any legally protected interest." *Restatement (Second) Of Torts* § 7(1) (1965). Asbestos exposure is the invasion of the plaintiff's interest in bodily freedom from toxic agents, but this Court has held in effect that the interest does not receive legal protection until

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extinguished as a result of the settlement and release agreement." *Id.* at 199.

the plaintiff manifests an asbestos related disease. *Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 427 (1997). Thus, the development of mesothelioma is not a new "injury" under FELA, *i.e.*, there was no separate "invasion" by Norfolk Southern of any interest of the plaintiff at that time. Rather mesothelioma is a consequential physical harm from the same injurious wrongful act, but one which gives rise to a separate cause of action under the separate-disease rule. Accordingly, even under the separate-disease rule, the injured party may still execute a release of all future claims stemming from the original wrongful act, and that release is valid even if the cause of action had not accrued at the time of release.

Here, Lester Anderson had filed a specific claim for damages arising from his asbestosis and other injuries in 1984. With advice of counsel and knowledge of his future risks of contracting mesothelioma and other cancers, and for substantial consideration, he executed a bona fide compromise of that claim in 1986 which included a release of future claims (explicitly including mesothelioma). The ruling below, allowing both survival and wrongful-death actions to proceed even though they are predicated upon the same tortious conduct for which the release was executed, is irreconcilable with *Callen* and *Mellon*, and should be reversed.

II. THERE IS A MATURE AND ACKNOWLEDGED CONFLICT AMONG THE LOWER COURTS CONCERNING THE VALIDITY OF FELA RELEASES.

Despite the clear rule of *Callen* and *Mellon*, a mature split in the federal circuits has developed over the standards to apply to liability releases under FELA. The Sixth Circuit was the first to narrow the effect of this Court's precedents. In *Babbitt* v. *Norfolk & Western Railway*, the court of appeals adopted the bright line rule limiting releases to "a known claim for a specific injury." 104 F.3d 89, 93 (6th Cir. 1997). Subsequently, the Third Circuit, in *Wicker* v. *Consolidated*

Rail Corp., explicitly declined to adopt the Sixth Circuit rule. 142 F.3d 690, 701 (3d Cir. 1998). The Third Circuit held that a FELA plaintiff may release future claims that cover "known risks even if there is no present manifestation of injury," explaining that "[w]hile the elusiveness of any such determination might counsel in favor of a bright-line rule such as adopted in *Babbitt*, *we decline to adopt one here*." *Id.* (emphasis added). The Eleventh Circuit, in addressing the validity of a post-injury settlement release under FELA, distinguished *Babbitt* and chose to follow the Third Circuit's *Wicker* rule. *Sea-Land Serv., Inc.* v. *Sellan*, 231 F.3d 848, 852 (11th Cir. 2000). The result has been widespread confusion. Indeed, various courts have expressly recognized the existence of a substantial and continuing conflict among the authorities on this question.[7] There are now multiple state appellate courts (including the court below) on each side of the divide. Compare App. 10a-12a (following *Babbitt*), and *Stephens* v. *Alabama State Docks Terminal Ry.*, 723 So. 2d 83, 86-87 (Ala. Civ. App. 1998) (same), with *Loyal* v. *Norfolk S. Corp.*, 507 S.E.2d 499, 502 & n.4 (Ga. Ct. App. 1998) (following *Wicker*), and *Wolf* v. *Consolidated Rail Corp.*, 840 A.2d 1004, 1007 (Pa. Super. Ct. 2003) (same).

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[7] *See, e.g.*, *Loyal* v. *Norfolk S. Corp.*, 507 S.E.2d 499, 502 n.4 (Ga. Ct. App. 1998) (noting "[o]nly the Sixth Circuit has adopted a bright line rule that a release may be valid *only* with regard to injuries that are known at the time the release is executed. The majority of courts have not so found.") (citations omitted); *Davison* v. *Norfolk S. Ry.*, CL02-36, 2003 WL 21536815, at *3 (Va. Cir. Ct. June 6, 2003) (noting "[t]he only clear articulation by federal circuit courts of the standard to be used in analyzing such a release, that I have found, comes from the Third Circuit and Sixth Circuit. The Sixth Circuit has held that '[t]o be valid, a release must reflect a bargained for settlement of a known claim for specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him.' The Third Circuit has declined to follow such a bright line rule.") (footnote omitted).

1. The Sixth Circuit was the first to run afoul of *Callen* and *Mellon* by upholding only releases of known claims for a specific injury as valid under section 5. In *Babbitt*, the court addressed a release by railroad employees accepting a "buy-out" or severance from the company. *Babbitt*, 104 F.3d at 90. The plaintiff-employee signed an agreement releasing the railroad from any and all claims they may have against the company, known and unknown. Subsequently, the employee brought a FELA claim for hearing loss. *Id.*

Rather than rely on a distinction between severance agreements and settlements in compromise of a claim, see *id.*, the Sixth Circuit instead leapt to establish a bright-line rule for upholding releases under section 5 of FELA: "[t]o be valid, a release must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." *Id.* at 93. This bright-line rule directly conflicts with *Callen* and *Mellon* by severely limiting the scope of liability releases contained in settlement agreements of existing claims.

It was this flawed decision that led the state court below astray, even though it acknowledged that "the majority of courts" have not adopted the *Babbitt* bright-line rule. App. 13a. In fact, the court of appeals decision goes further than did *Babbitt*, as it applied *Babbitt* to a release that settled a specific prior claim. Other courts beyond the court below have likewise adopted the *Babbitt* rule. See, *e.g.*, *Stephens*, 723 So. 2d at 86-87 (relying on *Babbitt* in finding that a post-injury general release does not apply to a new injury or the aggravation of the old injury).

2. In contrast to the Sixth Circuit's "known claim" approach, other circuits have adopted a more fact-based "known risk" approach to liability releases under FELA. The first federal court of appeals to disavow *Babbitt* was the Third Circuit. It held in *Wicker* v. *Consolidated Rail Corp.* that "[w]hile the elusiveness of any such determination might

counsel in favor of a bright-line rule such as adopted in *Babbitt, we decline to adopt one here.*" 142 F.3d at 701 (emphasis added).

In *Wicker*, plaintiff-employees, who had previously signed general releases as part of injury claim settlements, brought suits alleging new injuries. The court acknowledged that "the proper application and reach of § 5 remains unclear" and postulated that this is because decisions addressing general releases tend to be fact-driven. *Id.* at 698. Regarding *Callen*, the court stated that "[a]lthough the Supreme Court in *Callen* refused to void the releases executed in compromise of an employee's claims, the Court has not had occasion to explain how wide a net its ruling casts." *Id.* After looking in vain for a limiting rule from this Court that it presumed was lacking in *Callen*, the court added, "[n]ot surprisingly, lower courts that have addressed this issue have disagreed on the proper interpretation of § 5." *Id.* at 699.

Addressing the Sixth Circuit's rule, the court explained that such a narrow rule was inimical to the interests of both employee and employer. It reasoned that:

> [I]t is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement. The employer may desire to quantify and limit its future liabilities and the employee may desire an immediate settlement rather than waiting to see if injuries develop in the future. To put it another way, the parties may want to settle controversies about potential liability and damages related to known risks even if there is no present manifestation of injury.

Id. at 700-01. As a result, the Third Circuit held that a release does not violate section 5 "provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those *risks* which are *known* to the parties

at the time the release is signed." *Id.* at 701 (emphases added).

The conflict in the federal circuits was further deepened when the Eleventh Circuit embraced the *Wicker* approach. The Eleventh Circuit addressed the validity of a post-injury settlement release under section 5 of FELA in *Sea-Land Service, Inc.* v. *Sellan*, 231 F.3d 848 (11th Cir. 2000). The court explained, "[c]ontrary to [plaintiff's] argument, enforcement of the Agreement is consistent with the *Wicker* holding . . . . The Agreement was intended *to prevent the very risk at issue here*." *Id.* at 852. Other appellate courts outside of the Third Circuit have followed the *Wicker* rule as well. See *Loyal*, 507 S.E.2d at 502; *Wolf*, 840 A.2d at 1007.

Had the Ohio court below followed the lead of the Third and Eleventh Circuits, Norfolk Southern would have prevailed below. According to *Wicker*, a valid release can cover claims for a disease that is not necessarily present at the time of execution if the risk of the plaintiff's later contracting that disease is known. This is precisely the situation the court of appeals faced. Even if the actual disease of mesothelioma was not manifest at the time Mr. Anderson executed the release, he knew of his risk of developing mesothelioma at that time. Valid consideration was received for that risk. Therefore, under *Wicker*, the release here blocks Mrs. Anderson's wrongful death and survival claims resulting from Mr. Anderson's death from mesothelioma.

The disarray in the lower courts on this issue of fundamental importance under FELA, *Duncan*, 315 U.S. at 5, stems from a patent misinterpretation of *Callen* and inattention to *Mellon*. This Court has emphasized that "until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others." *Callen*, 332 U.S. at 630. There is no basis for the unduly stringent rule of *Babbitt* followed below. The mature and acknowledged 2-1 split in the federal circuits, with multiple state appellate courts on either side of the divide,

undermines what was intended to be a national standard. This Court should act now to bring clarity and closure to the standards that apply to releases under FELA.

III. REVIEW IS NECESSARY TO FORESTALL FURTHER DEGENERATION OF THE ASBESTOS-LITIGATION CRISIS

As this Court has emphasized time and again, this nation is mired in an asbestos-litigation crisis, *Amchem Products Inc.* v. *Windsor*, 521 U.S. 591, 597 (1997), and "the elephantine mass of asbestos cases . . . defies customary judicial administration." *Ortiz* v. *Fireboard Corp.*, 527 U.S. 815, 821 (1999); see also *Ayers*, 538 U.S. at 166. Over 600,000 asbestos-injury claims had been filed nationally by the end of 2000, costing businesses more than $54 billion. Stephen J. Carroll et al., RAND Institute for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* vi-vii (2002), *available at* http://www.rand.org/publications/DB/DB397/DB397.pdf ("RAND Study"). The filing of new claims is sharply accelerating, 90% of which are asserted by plaintiffs alleging nonmalignant injuries. *Id.* at 40-46. Over 6,000 defendants in 75 of the 83 industries in the United States are defending asbestos claims. *Id.* at vi-vii; Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14 ("[T]he net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."); see also *Ayers*, 538 U.S. at 169 (Kennedy, J. concurring in part and dissenting in part) ("Asbestos litigation has driven 57 companies, which employed hundreds of thousands of people, into bankruptcy, including 26 companies that have become insolvent since January 1, 2000."). It is projected that current claims are only one-fifth to one-half of the total number of claims that will be filed, and the estimated total future costs of asbestos litigation range as high as $265 *billion*. RAND Study at vii; *Ayers*, 538 U.S. at 186 (Breyer, J., concurring in part and dissenting in part); see also Brief of Association of American Railroads as *Amicus Curiae* at 6 n.10, *Norfolk &*

W. Ry. Co. v. *Ayers*, 538 U.S. 135 (2003) (No. 01-963) (noting that in only a five-year period, from 1996 through 2000, over 7,500 asbestos-related FELA suits were filed against railroads, comprising 45 percent of all FELA suits in 2000). Transaction costs (such as lawyers' fees) already have consumed over half of the $54 billion spent to date on asbestos litigation. RAND Study at vii.

It has long been recognized that it is a procedural impossibility to conduct trials of the hundreds of thousands of pending asbestos-claims, which are complex, time-consuming, and expensive to litigate. See Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991). With limited exception, in the railroad context, asbestos-related claims under FELA generally have been resolved by settlement. Cf. Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 480 (1986) (explaining that approximately ninety-eight percent of asbestos disease cases that are resolved are settled). This is especially true for noncancerous claims, which involve much lower damages than cancer claims but similarly high transactions costs. Typically, Norfolk Southern's settlements compromising an asbestosis or other noncancer claim, like the 1986 agreement at issue here, involve a release of all asbestos-related claims, including lung cancer and mesothelioma claims.

Such settlements are fully in accord with FELA's goals of fair compensation for injured workers. Plaintiffs who execute such releases gain substantially higher settlements than if they had released only their currently accrued noncancerous claims, and the railroads purchase peace and predictability in managing their liability risks. See *Wicker*, 142 F.3d at 695 (noting district court finding that plaintiffs who sign general releases tend to receive higher larger settlements, and defendants are willing to pay higher sums to settle claims under a general release). Those settlements may be smaller

than damages awards in mesothelioma cases. But such settlements reflect the rational calculation of plaintiffs (with advice of counsel) that most persons with noncancerous asbestos injuries (even asbestosis) do not contract cancer, *Ayers*, 538 U.S. at 178-79 (Kennedy, J., concurring in part and dissenting in part); that any award of damages for cancer may be (as here) decades away, given the long latency periods for mesothelioma and other types of cancer, *id.* at 175 (Kennedy, J., concurring in part and dissenting in part); that plaintiffs avoid the litigation costs of trial and the risk that they may not be able to prove the railroad's liability; and that the plaintiffs retain the right to sue other defendants (such as asbestos manufacturers) if they contract cancer, a right expressly reserved in this agreement, App. 28a. In sum, it is often in the interest of the plaintiff as well as the railroad to secure immediate and permanent settlement of all asbestos-related claims. *Wicker*, 142 F.3d at 700-01; *Loyal*, 507 S.E.2d at 502 ("Clearly, in an industry, such as the railroad industry, that has a number of known occupational risks and diseases, it is important for both the employer and employee to be able to settle potential claims regarding injuries or diseases prior to actual discovery.").

The nullification of thousands of existing settlements with asbestos plaintiffs accomplished by the rule adopted below underscores the importance of the issue on which the courts are divided, but even more critical is the uncertainty it injects prospectively into the settlement process. Railroads will not continue to negotiate substantial settlements with plaintiffs alleging noncancerous injuries if the releases the railroads receive in return are invalid. Such disincentives to rational settlements will impede the efficient clearing of asbestos dockets, thus creating greater burdens on the courts and raising the share of resources that are devoted to transaction costs (*i.e.*, trial preparation and litigation) rather than plaintiff recoveries.

Not only is the rule below wrong and destructive, and contrary to this Court's precedents, but the conflict in the circuits also invites forum shopping. Under FELA's liberal venue rules, plaintiffs have their choice to sue in any jurisdiction where the railroad operates. 45 U.S.C. § 56; *Boyd* v. *Grand Trunk W. R.R.*, 338 U.S. 263, 265 (1949). Norfolk Southern currently operates in multiple circuits, including the Third, Sixth, and Eleventh. See Distribution Network, Norfolk Southern Web Site (last visited July 23, 2004) (system map), *at* http://www.nscorp.com. So too does CSX Transportation, Inc., the other major Class 1 Eastern railroad. See Check Locations, CSX Corp. Web Site (July 23, 2004) (system map), *at* http://www.csx.com. A cancer plaintiff who has previously released his claim can simply choose to sue Norfolk Southern or CSX in the Sixth Circuit (or the state of Ohio) to avoid the *Wicker* rule, even if his claim belongs more properly in the Third or Eleventh Circuit or some other jurisdiction.[8]

It is antithetical to the uniformity mandate of FELA, *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 361 (1952), for conflicting rules in the lower courts to be left unresolved. Given the mature and acknowledged split in the circuits, the fundamental importance of section 5, *Duncan*, 315 U.S. at 5, and the destructive effects of uncertainty upon efficient settlement of mounting asbestos-related claims, this Court should grant review.

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[8] The appointed judge who presides over the asbestos docket in the Court of Common Pleas in Cuyahoga County, Ohio, summarily denies forum non conveniens motions to dismiss the complaints of out-of-state plaintiffs, *see, e.g.*, *Hess* v. *Norfolk S. Ry.*, 795 N.E.2d 91, 95-97 (Ohio Ct. App. 2003), *appeal allowed*, 804 N.E.2d 40 (Ohio 2004) (table), which has made that particular jurisdiction a magnet for asbestos-related litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 27, 2004

APPENDIX A

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY

Nos. 82304 & 82426

SHIRLEY ANDERSON, Individually, As Executor of The Estate of LESTER ANDERSON, Deceased,
Plaintiff-Appellant,

v.

A.C. & S., INC., *et al.*,
Defendants-Appellees.

Decided Sept. 18, 2003

OPINION

TIMOTHY E. McMONAGLE, *Judge.*

{¶ 1} Plaintiff-appellant, Shirley Anderson, individually and as executor of the estate of Lester Anderson, her deceased husband, appeals from various orders of the trial court, which, in essence, granted in part the motion for summary judgment of defendants-appellees, Norfolk & Western Railway Company, Norfolk Southern Railway Company, Norfolk Southern Corporation, and American Financial Group. Defendants-appellees cross-appeal.

I. PROCEDURAL HISTORY

{¶ 2} In March 2000, appellant brought suit against multiple parties, asserting claims pursuant to the Federal Em-

ployers' Liability Act ("FELA"), Section 51 et seq., Title 45 U.S. Code, as a result of Lester Anderson's death in 1998 from mesothelioma, allegedly caused from exposure to asbestos and asbestos-containing products while he was employed by appellees and their predecessor railroads. Appellant asserted a survivorship claim for personal injuries suffered by Lester Anderson during his lifetime and a wrongful-death claim.

{¶ 3} Appellees subsequently filed a motion for summary judgment, in which they argued that appellant's claims were barred by a "Covenant Not To Sue And to Cease Suing" signed by both appellant and Lester Anderson in 1986 as settlement of an earlier lawsuit against appellees.

{¶ 4} The trial court initially denied appellees' motion. After appellees filed a motion for clarification of the trial court's order, the trial court issued an order granting the motion and stating, "The claim remaining is Shirley Anderson's claim for wrongful death under F.E.L.A."

{¶ 5} Appellant then filed a motion for further clarification of the trial court's order, seeking to clarify the viability of appellant's survivorship claim. The trial court denied appellant's motion.

{¶ 6} Appellant then filed a motion to allow evidence of Lester Anderson's survival claim and damages to be presented at trial. Subsequently, the trial court issued an order that stated:

{¶ 7} "The Court after oral arguments and briefs found that the plaintiff's survival claims were extinguished by a release executed by Lester Anderson on March 26, 1986. The Court finds that the release was signed after consulting with counsel and the plaintiff's awareness of the potential risks of contracting other lung diseases and cancer. Plaintiff's motion to allow evidence of Lester Anderson's survival claim and damages is denied. Judgment for Defendants. Final. There is no just reason for delay."

{¶ 8} Appellant appealed from this order; appellees cross-appealed. Subsequently, the trial court journalized its orders denying appellees' motion for summary judgment, granting appellees' motion for clarification, and denying appellant's motion for further clarification. Appellant filed a second notice of appeal from these orders; appellees likewise filed a second notice of cross-appeal. Pursuant to motion, the appeals were consolidated.

II. THE FIRST LAWSUIT AND COVENANT NOT TO SUE

{¶ 9} The record reflects that from 1940 until 1961, Lester Anderson was employed as a sheet metal worker and pipe fitter by the Nickel Plate Railway Company, absent service in the United States Navy from 1944 through 1946. Thereafter, from 1961 through 1964, Anderson was employed by the New York Central Railroad Company as a sheet metal and maintenance worker. Anderson was exposed to asbestos and asbestos-containing products at various times during his employment with the railroads. In 1983, via a union screening, Anderson was diagnosed with asbestosis.

{¶ 10} In November 1984, Lester and Shirley Anderson filed suit against appellees and others, seeking compensation under FELA for damages incurred as a result of Lester's asbestosis.

{¶ 11} In consideration of settlement funds of $50,000, on March 26, 1986, the Andersons executed a Covenant Not to Sue and To Cease Suing appellees. The Covenant stated:

{¶ 12} "FOR THE SOLE AND ONLY CONSIDERATION of the sum of FIFTY THOUSAND DOLLARS ($50,000) the receipt and sufficiency of which is hereby acknowledged the undersigned LESTER ANDERSON does for himself, his successors and assigns, hereby agree to cease suing and not to sue or present any claims, demands, rights,

and causes of action of whatever kind, nature or description including but not limited to such as may exist at common law, by statute or by virtue of the Federal Employers Liability Act or the Boiler Inspection Act against the Norfolk and Western Railway Company, its parent, the Norfolk Southern Corporation and, to the same extent as if expressly named herein, their respective subsidiaries and affiliated companies * * * (hereinafter collectively referred to as the NW) and, Pennsylvania Railroad, New York Central Railroad, Penn Central Corporation, Consolidated Rail Corpora-tion and National Railroad Passenger Corporation, and any and all other related persons, firms, companies, partnerships and corporations * * * (hereinafter collectively referred to as CONRAIL) which the undersigned may now or hereafter have or assert against NW or CONRAIL arising out of or by reason of or in any manner connected with or related to LESTER ANDERSON's employment or association with the NW or CONRAIL and the injuries, losses and damages, whether physical, mental or financial resulting therefrom, said injuries, losses and damages being in part set forth and described in the pleadings and documents filed in the * * * PENDING CASE.

{¶ 13} "WITHOUT IN ANY MANNER LIMITING THE FOREGOING, the consideration paid hereunder for and on behalf of the NW or CONRAIL does hereby satisfy that portion of the total amount of losses and damages suffered or incurred by LESTER ANDERSON and SHIRLEY JOYCE ANDERSON, individually and as husband and wife, their successors and assigns which have been caused by any conduct on the part of the NW or CONRAIL, regardless of the description of such conduct, as may be hereafter determined in the further trial or other disposition of the PENDING CASE or in any other action brought or commenced by LESTER ANDERSON and SHIRLEY JOYCE ANDERSON individually and as husband and wife and the said LESTER ANDERSON and SHIRLEY JOYCE

ANDERSON individually and as husband and wife do hereby release and forever discharge that fraction, portion or percentage of the total claim, demand, right or cause of action for injuries, losses or damages whether physical, mental or financial against all parties which may hereafter by further trial or other disposition of the PENDING CASE or any other action be determined to be caused by the NW or CONRAIL.

{¶ 14} "WITHOUT IN ANY MANNER LIMITING THE FOREGOING, this agreement is not and is not to be deemed to be evidence of or an admission of liability on the part of the NW or CONRAIL, but constitutes a compromise in settlement of a disputed claim.

{¶ 15} "FURTHER, WITHOUT IN ANY MANNER LIMITING THE FOREGOING. this covenant is expressly intended to and does include any and all claims which the said SHIRLEY JOYCE ANDERSON may now or hereafter have or assert for loss of services, companionship, consortium, medical, hospital, nursing and pharmaceutical expense arising out of, relating to or resulting from the aforesaid association or employment of LESTER ANDERSON at the NW or CONRAIL.

{¶ 16} "IT IS FURTHER AGREED AND UNDERSTOOD without any limitation on the foregoing that this agreement includes on behalf of LESTER ANDERSON[,] his successors and assigns[,] any claim, demand, right or cause of action for injuries, losses and damages resulting from or relating in any manner to exposure to or ingestion of any substance whatsoever[,] including but not limited to asbestos dust or fiber and any diseases resulting therefrom as well as asbestosis or asbestos-related disease, illness or injury including any and all forms of cancer or mesothelioma, claimed to be related to asbestos or any other substance whether or not presently alleged or manifested."

III. STANDARD OF REVIEW

{¶ 17} In her single assignment of error, appellant contends that the trial court erred in denying her motion to allow evidence of Lester Anderson's survival claim and damages to be presented at trial. Although appellant's assignment of error is couched in terms of a denial by the trial court to allow evidence of the survivorship claim at trial, in reality appellant is appealing from the judgment of the trial court granting appellees' motion for summary judgment on the survivorship claim.

{¶ 18} In their cross-appeal, appellees assert that the trial court erred in denying their motion for summary judgment in part, i.e., the trial court erred in ruling that Shirley Anderson's wrongful-death claim was not barred by the release executed by Lester and Shirley Anderson in the prior action.

{¶ 19} FELA cases may be brought, at plaintiff's option, in federal court or in state court. Section 56, Title 45, U.S. Code. "FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *Vance v. Consol. Rail Corp.* (1995), 73 Ohio St.3d 222, 227, 652 N.E.2d 776.

{¶ 20} This court reviews the trial court's judgment regarding a motion for summary judgment de novo and uses the same standard that the trial court applies under Civ.R. 56(C). See *Renner v. Derin Acquisition Corp.* (1996), 111 Ohio App.3d 326, 333, 676 N.E.2d 151; *North Coast Cable Ltd. Partnership v. Hanneman* (1994), 98 Ohio App.3d 434, 440, 648 N.E.2d 875. Summary judgment is appropriate when: 1) there is no genuine issue of material fact, 2) the moving party is entitled to judgment as a matter of law, and 3) after construing the evidence most favorably for the party against whom the motion is made, reasonable minds can reach only a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.

3d 367, 369-370, 696 N.E.2d 201; *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 364 N.E.2d 267.

IV. LAW AND ANALYSIS

{¶ 21} The Federal Employers' Liability Act ("FELA"), Section 51 et seq., Title 45 U.S. Code, makes common carrier railroads liable in damages to employees who suffer work-related injuries caused by the railroad's negligence. Section 51 of the Act provides:

{¶ 22} "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * *."

{¶ 23} "At the time of FELA's enactment, many railroads 'insisted on a contract with their employees, discharging the company from liability for personal injuries.'" *Damron v. Norfolk & W. Ry. Co.* (N.D.Ohio 1995), 925 F. Supp. 520, 523, quoting H.R. Rep. 1386, 60th Cong., 1st Sess. 6 (1908). The effect of such contracts was to completely deprive injured employees of their rights to actions at law. *Id.*, citing S.Rep. No. 400, 60th Cong., 1st Sess. 3 (1908). Consequently, Congress enacted Section 55 to limit a railroad company's ability to escape liability by using such contracts. Section 55 of the Act provides that:

{¶ 24} "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void * * *."

{¶ 25} The central issue presented by this case is whether Section 55 prohibits appellees from absolving themselves of liability for appellant's FELA claims by virtue of appellant's execution of the 1986 Covenant Not To Sue And To Cease Suing. Appellees' position is that it "bought its peace" from

appellant when, in consideration of $50,000, Lester and Shirley Anderson signed the agreement to settle their pending case and release all future claims against appellees. Accordingly, appellees assert, both appellant's survival claim and her wrongful-death claim are barred by the release. Appellant, on the other hand, contends that the release is void because it contravenes Section 55 and, therefore, neither her survival claim nor her wrongful-death claim are barred.

{¶ 26} The validity of a release in a FELA action is governed by federal rather than state law. *Maynard v. Durham S. Ry. Co.* (1961), 365 U.S. 160, 161, 81 S.Ct. 561, 5 L.Ed.2d 486, The party attacking the release bears the burden of showing the release to be invalid. *Callen v. Pennsylvania R.R. Co.* (1948), 332 U.S. 625, 629-630, 68 S.Ct. 296, 92 L.Ed. 242.

{¶ 27} As appellees correctly argue, the United States Supreme Court has held that "a release of FELA claims can have the same effect as any other release, in that it may constitute a settlement or compromise, rather than an attempt to escape liability." *Babbitt v. Norfolk & W. Ry. Co.* (C.A.6, 1997), 104 F.3d 89, 92, citing *Callen v. Pennsylvania R.R. Co.* (1948), 332 U.S. 625, 68 S.Ct. 296, 92 L.Ed. 242.

{¶ 28} "In *Callen*, a plaintiff brought suit against a railroad company for injuries sustained during the course of his employment. Prior to the suit, but subsequent to the injuries, the plaintiff executed a general release freeing the railroad from liability *for the injuries sustained in the accident* in exchange for two hundred and fifty dollars. *Callen*, 332 U.S. at 626 [68 S.Ct. 296, 92 L.Ed. 242]. The issue before the Supreme Court was not the validity of the release, but rather the accuracy of the trial judge's instructions to the jury. However, after dealing with the jury instruction issue, the Court, in the last paragraph of its opinion, dismissed an argument raised by the plaintiff that the release could not be enforced in the face of 45 U.S.C. § 55.

The Court noted that the release was 'not a device to exempt from liability but a means of compromising a claimed liability' and 'where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.' *Callen*, 332 U.S. at 631 [68 S.Ct. 296, 92 L.Ed. 242]. Thus, the Supreme Court has found that a release executed as part of a settlement of disputed liability for work-related injuries can survive application of 45 U.S.C. § 55." (Emphasis sic.) *Babbitt*, 104 F.3d at 92. See, also, *Boyd v. Grand Trunk W. R.R.* (1949), 338 U.S. 263, 266, 70 S.Ct. 26, 94 L.Ed. 55 ("[A] full compromise enabling the parties to settle their dispute without litigation * * * [does] not contravene the [Federal Employers' Liability] Act.")

{¶ 29} Thus, we must determine whether the release document at issue represents a permissible compromise and settlement or whether it is the type of "device" intended to exempt from FELA liability that is prohibited by Section 55 of FELA.

{¶ 30} The "purpose or intent" of such devices "is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce." *Apitsch v. Patapsco & Back Rivers R.R. Co.* (D.Md.1974), 385 F.Supp. 495, 504, citing *Philadelphia B. & W. R.R. v. Schubert* (1912), 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911.

{¶ 31} Here, the first paragraph of the release stated:

{¶ 32} "* * * Lester Anderson does for himself, his successors and assigns, hereby agree to cease suing and *not to sue or present any claims, demands,*[1] *rights, and cause of action of whatever kind, nature or description* including but not limited to such as may exist at common law, by statute or by virtue of the Federal Employers Liability Act or the Boiler Inspection Act against the Norfolk and Western Railway Company * * *." (Emphasis added.)

{¶ 33} Thus, it is apparent from the plain language of the release that the intent of the release was to exempt appellees from all potential liability related to Lester Anderson's employment. Indeed, appellee American Financial Group admits that "the original intent of the release was indeed to release any and all future claims." Brief on Appeal at 15.

{¶ 34} Appellees contend, however, that although the language is broad, the agreement was not a blanket waiver of liability but merely an attempt by appellees to "buy their peace" from appellant regarding his alleged occupational exposure to asbestos or asbestos-containing products while employed by the railroad.

{¶ 35} With respect to claims related to appellant's exposure to asbestos, the agreement stated:

{¶ 36} "It is further agreed and understood * * * that this agreement includes * * * any claim, demand, right or cause of action for injuries, losses and damages resulting from or relating in any manner to exposure to or ingestion of any substance whatsoever including but not limited to asbestos dust or fiber and any diseases resulting therefrom as well as asbestosis or asbestos-related disease, illness or injury including any and all forms of cancer or mesothelioma, claimed to be related to asbestos or any other substance whether or nor presently alleged or manifested."

{¶ 37} In *Babbitt v. Norfolk & W. Ry. Co.* (C.A.6, 1997), 104 F.3d 89, the Court of Appeals for the Sixth Circuit considered whether a resignation and general release agreement signed by the plaintiffs when they separated their employment from the railroad company barred their subsequent FELA claims for hearing loss caused by excessively noisy work conditions. The Sixth Circuit noted that "it is clear that FELA is not offended when there is a compromise of a claim of liability that settles a specific injury sustained by an employee." *Babbitt*, 104 F.3d at 93. Continuing, the court stated:

{¶ 38} "[W]here there exists a dispute between an employer and employee with respect to a FELA claim, the parties may release their specific claims as part of an out-of-court settlement without contravening the Act. However, where the release was not executed as part of a specific settlement of FELA claims, 45 U.S.C. § 55 precludes the employer from claiming the release as a bar to liability. *To be valid, a release must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him.*" (Emphasis added; citations omitted.) Id.

{¶ 39} Accordingly, the Sixth Circuit reversed the grant of summary judgment in favor of the railroad and remanded the case for a determination regarding whether the release "was intended to resolve a claim of liability *for the specific injuries in controversy*." (Emphasis sic.) Id.

{¶ 40} Likewise, in *Fannin v. Norfolk & W. Ry. Co.* (1995), 106 Ohio App.3d 401, 666 N.E.2d 291, the Ninth Appellate District Court considered whether a general release signed as part of the employer's "settlement/buy-out proposal" for its employees was a valid waiver of potential FELA claims sufficient to bar the employees' subsequent claims for work-related injuries and asbestos exposure. The court noted that in *Callen*, the United States Supreme Court stated that parties may settle their FELA claims without litigation "where controversies exist as to whether there is liability." Id. at 407, 666 N.E.2d 291. The court then reasoned:

{¶ 41} "While such language seems to indicate that parties may indeed settle FELA claims via a release, it is clear that this only applies to claims which have already arisen *at the time the release is signed*; the release is valid only 'where controversies exist,' i.e, where it disposes of an accrued FELA claim. Thus, while one can contract to settle or waive

actual FELA *claims*, one may *not* similarly contract to waive all FELA *rights* with respect to claims which have not yet arisen." Id. (Emphasis sic.)

{¶ 42} Asbestosis and mesothelioma, although both caused by exposure to asbestos fibers, are separate and distinct diseases that give rise to separate and distinct causes of action under FELA. *Wilson v. Johns-Manville Sales Corp.* (C.A.D.C. 1982), 684 F.2d 111, 114; *Hagerty v. L & L Marine Serv., Inc.* (C.A.5, 1986), 788 F.2d 315, 320. Under FELA, claims accrue when the claimant knew, or in the exercise of reasonable diligence should have known, of both the latent injury and its work-related cause. *Voytko v. Consol. Rail Corp.* (C.A.6, 1996), 94 F.3d 645, 646.

{¶ 43} The record in this case reflects that Lester Anderson was not diagnosed with mesothelioma until January 9, 1998, some 12 years after he signed the release at issue. Thus, Anderson's claim for mesothelioma had not yet accrued in 1986 when he signed the release and, accordingly, in light of *Babbitt* and *Fannin*, the release cannot bar this nonaccrued claim for an unknown injury. Appellees argue, however, that *Babbitt* and *Fannin* are not relevant to the release signed by Anderson because they involved releases signed in connection with a buy-out from the company, rather than the settlement of litigation. We are not persuaded. Although factually the cases may differ, the principle announced in each is the same: under FELA, a release is valid only where it disposes of an accrued claim for a known injury.

{¶ 44} Accordingly, we find appellees' reliance on *Wicker v. Consol. Rail Corp.* (C.A.3, 1998), 142 F.3d 690, misplaced. In *Wicker*, the Third Circuit Court of Appeals held that a release does not violate Section 55 provided that it is executed for valid consideration as part of a settlement, "and [that] the scope of the release is limited to those risks which are known to the parties at the time the release is signed." Id. at 701. Appellees argue that the release in the instant case is

valid, therefore, because at the time the release was executed, Anderson was aware of the *risk* of developing mesothelioma or other lung cancer as a result of his occupational exposure to asbestos.

{¶ 45} This is not the rule in the Sixth Circuit, however. Although the majority of courts have not so found, "the Sixth Circuit has adopted a bright-line rule that a release may be valid only with regard to injuries that are known at the time the release is executed." *Loyal v. Norfolk S. Corp.* (1998), 234 Ga.App. 698, 701, 507 S.E.2d 499. Thus, although Anderson may have been aware of the risk of developing mesothelioma as a result of his exposure to asbestos, because he did not have mesothelioma when he signed the release, his claim had not yet accrued and, therefore, he could not release it.

{¶ 46} Appellees also argue that the release is not a blanket waiver of liability but merely settlement of Anderson's claims for injuries resulting from asbestos exposure, because of the specificity of the language found in the third paragraph on page 2 of the release, in which Anderson specifically released his claims for "asbestosis or asbestos-related disease, illness or injury[,] including any and all forms of cancer or mesothelioma * * *."

{¶ 47} Contrary to appellees' assertion, however, the same paragraph also purports to release appellees from liability for "any claim, demands, rights, and causes of action of whatever kind, nature or description," including "injuries, losses and damages resulting from or relating in any manner to exposure to or ingestion *of any substance whatsoever* * * * whether or not presently alleged or manifested." (Emphasis added.) This broad language is clearly not a bargained-for settlement of only Anderson's asbestosis claim and injuries related to that claim. Reading this language in conjunction with the very broad language of the first paragraph of the release, it is apparent that the release goes well beyond merely compro-

mising a claimed liability and impermissibly purports to exempt appellees from all "potential future claims the employee might have arising from injuries known or unknown by him." *Babbitt*, 104 F.3d at 93.

{¶ 48} Appellees also contend that we should find the release valid because Lester and Sheila Anderson were represented by counsel when they signed the release. Representation by counsel, however, cannot make an otherwise invalid release valid.

{¶ 49} Finally, we reject appellees' argument that appellant's claim is barred because she already recovered for the alleged wrongful act of the railroad companies, i.e., occupational exposure to asbestos, and is therefore not entitled to bring another claim based on the same tortious conduct.

{¶ 50} As noted recently by the United States Supreme Court, the separate-disease rule "allows a person who has recovered for injuries resulting from asbestosis to bring a new lawsuit—notwithstanding the traditional common-law proscription against splitting a cause of action—if cancer develops." *Norfolk & W. Ry. Co. v. Ayers* (2003), 538 U.S. 135, 123 S.Ct. 1210, 155 L.Ed.2d 261 (Kennedy, J., dissenting). The separate-disease rule "evolved as a response to the special problem posed by latent-disease cases. Under the single-action rule, a plaintiff who recovered for asbestosis would then be precluded from bringing suit for later-developed mesothelioma. Allowing separate complaints for each disease, courts determined, properly balanced a defendant's interest in repose and a plaintiff's interest in recovering adequate compensation for negligently inflicted injuries. * * * The rule simply allows recovery for successive diseases and would necessarily exclude only double recovery for the same element of damages." Id. at 1221, 155 L.Ed.2d 261, fn. 12. See, also, Henderson & Twerski, Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring (2002), 53 S.C.L. Rev. 815,

821, fn. 22. Accordingly, appellant's settlement of the asbestosis claim does not bar her subsequent recovery for a mesothelioma claim.

{¶ 51} Appellant's assignment of error is well taken. The trial court erred in granting appellees' motion for summary judgment regarding appellant's survival claim because the release is not valid to exempt appellees from liability. Accordingly, we affirm that portion of the trial court's order denying appellees summary judgment regarding appellant's wrongful-death claim and reverse that portion of the trial court's order granting appellees summary judgment regarding appellant's survival claim.

{¶ 52} Appellees' cross-appeal is overruled.

Judgment affirmed in part; reversed in part and cause remanded.

PATRICIA A. BLACKMON, P.J., and ANNE L. KILBANE, J., concur.

APPENDIX B

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

[Filed Jan., 2003]

Judge Leo M. Spellacy
CASE NO. 405093

SHIRLEY ANDERSON,

vs.

A C & S, *et al.*

ORDER

SPELLACY, J.:

Plaintiff Shirley Anderson, individually and as Executrix of the estate of Lester Anderson, has requested clarification of a previous order of the Court (SE CLAD # 105603).

The Court after oral arguments and briefs found that Plaintiff's survival claims were extinguished by a release executed by Lester Anderson on March 26, 1986. The Court finds that the release was signed after consulting with counsel and Plaintiff's awareness of the potential risks of contracting other lung diseases and cancer. Plaintiff's motion to allow evidence of Lester Anderson's survival claim and damages (CLAD # 107024) is denied. Judgment for Defendants.

Final. There is no just reason for delay.

January 7, 2003
/s/ Leo M. Spellacy
LEO M. SPELLACY, Judge

APPENDIX C

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

[Filed Jan. 28, 2003]

405093
JUDGE LEO SPELLACY

ANDERSON,

Plaintiff,

V.

A.C. & S.

Defendants.

JOURNAL ENTRY

Spellacy, J.:

Plaintiff's Motion for further Clarification of the Court's Order of August 7, 2002 is DENIED.

/s/ Leo M. Spellacy
JUDGE LEO M. SPELLACY

Filed on CLAD: December 23, 2002

APPENDIX D

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

[Filed Jan. 21, 2003]

CASE NO. 405093
Judge Leo M. Spellacy

SHIRLEY ANDERSON, individually And as Administratrix for the Estate of Lester Anderson

Plaintiff,

V.

A.C. & S, INC.

Defendants.

ORDER

Spellacy, J.:

Defendants Norfolk & Western Railway Co.; Norfolk & Southern Railway Co.; Norfolk Southern Corp.; and American Financial Group Inc.'s Motion for Clarification is GRANTED. The claim remaining is Shirley Anderson's claim for wrongful death under the F.E.L.A.

Filed on CLAD October 3, 2002.

/s/ Leo M. Spellacy
JUDGE LEO M. SPELLACY

APPENDIX E

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

[Filed Jan. 21, 2003]

CASE NO. 405093
Judge Leo M. Spellacy

SHIRLEY ANDERSON, individually And as Administratrix for the Estate of Lester Anderson,

Plaintiff,

V.

A.C. & S, INC.,

Defendants.

ORDER

Spellacy, J.:

Defendants Norfolk & Western Railway Co.; Norfolk & Southern Railway Co.; Norfolk Southern Corp.; and American Financial Group Inc.'s Motion for Summary Judgment is DENIED.

So ordered.
Filed on CLAD September 27, 2002.

/s/ Leo M. Spellacy
JUDGE LEO M. SPELLACY

APPENDIX F

2004-Ohio-2003

SUPREME COURT OF OHIO

NO. 2003-1966

ANDERSON,

v.

A.C. & S., INC.

April 28, 2004

RECONSIDERATION OF PRIOR DECISIONS

Cuyahoga App. Nos. 82304 and 82426, 154 Ohio App.3d 393, 2003-Ohio-4943. Reported at 101 Ohio St.3d 1467, 2004-Ohio-819, 804 N.E.2d 40. On motion for reconsideration of appellants Norfolk and Western Railway Co., Norfolk Southern Railway Co., and Norfolk Southern Corp. Motions denied.

Moyer, C.J., Lundberg Stratton and O'Connor, JJ., dissent.

Ohio 2004.

ANDERSON v. A.C. & S., INC.

APPENDIX G

2004-Ohio-819

SUPREME COURT OF OHIO

NO. 2003-1966

ANDERSON,

v.

A.C. & S., INC.

March 03, 2004

APPEALS NOT ACCEPTED FOR REVIEW

Cuyahoga App. Nos. 82304 and 82426, 154 Ohio App.3d 393, 2003-Ohio-4943, 797 N.E.2d 537.

Moyer, C.J., Lundberg Stratton and O'Connor, JJ., dissent.

Ohio 2004.

ANDERSON v. A.C. & S., INC.

APPENDIX H

STATUTORY PROVISIONS

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

45 U.S.C. § 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(Apr. 22, 1908, c. 149, § 2, 35 Stat. 65.)

45 U.S.C. § 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

(Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.)

45 U.S.C. § 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

APPENDIX I

COVENANT NOT TO SUE AND TO CEASE SUING

FOR THE SOLE AND ONLY CONSIDERATION of the sum of FIFTY THOUSAND DOLLARS ($50,000) the receipt and sufficiency of which is hereby acknowledged the undersigned LESTER ANDERSON does for himself, his successors and assigns, hereby agree to cease suing and not to sue or present any claims, demands, rights, and causes of action of whatever kind, nature or description including but not limited to such as may exist at common law, by statute or by virtue of the Federal Employers Liability Act or the Boiler Inspection Act against the Norfolk and Western Railway Company, its parent, the Norfolk Southern Corporation and, to the same extent as if expressly named herein, their respective subsidiaries and affiliated companies, leased and operated lines, and as to each, their respective predecessors, successors, assignees, lessors, officers, directors, agents, and employees, past and present, as well as their heirs and legal representatives (hereinafter collectively referred to as the NW) and, Pennsylvania Railroad, New York Central Railroad, Penn Central Corporation, Consolidated Rail Corporation and National Railroad Passenger Corporation, and any and all other related persons, firms, companies, partnerships and corporations, including its/their present and former insurers, owners, heirs, executors, administrators, subsidiaries, divisions, predecessors in business or interests, successors in business or interest, directors, officers, attorneys, medical personnel, employees, successors and assigns, which or might be claimed to be liable to me, my heirs, administrators, executors, successors and assigns (hereinafter collectively referred to as CONRAIL) which the undersigned may now or hereafter have or assert against NW or CONRAIL arising out of or by reason of or in any manner connected with or related to LESTER ANDERSON's

employment or association with the NW or CONRAIL and the injuries, losses and damages, whether physical, mental, or financial resulting therefrom, said injuries, losses and damages being in part set forth and described in the pleadings and documents filed in the cause entitled LESTER ANDERSON, and SHIRLEY JOYCE ANDERSON, plaintiffs, v. Norfolk & Western Railway Co., et al., being case no. 83441 on the docket of the Cuyahoga County Common Pleas Court, reference to said case and the pleadings and documents filed therein being hereby specifically made (hereinafter referred to as PENDING CASE).

WITHOUT IN ANY MANNER LIMITING THE FOREGOING, the consideration paid hereunder for and on behalf of the NW or CONRAIL does hereby satisfy that portion of the total amount of losses and damages suffered or incurred by LESTER ANDERSON, and SHIRLEY JOYCE ANDERSON, individually and as husband and wife, their successors and assigns which have been caused by any conduct on the part of the NW or CONRAIL, regardless of the description of such conduct, as may be hereafter determined in the further trial or other disposition of the PENDING CASE or in any other action brought or commenced by LESTER ANDERSON and SHIRLEY JOYCE ANDERSON individually and as husband and wife and the said LESTER ANDERSON and SHIRLEY JOYCE ANDERSON individually and as husband and wife do hereby release and forever discharge that fraction, portion or percentage of the total claim, demand, right or cause of action for injuries, losses or damages whether physical, mental or financial against all parties which may hereafter by further trial or other disposition of the PENDING CASE or any other action be determined to be caused by the NW or CONRAIL.

WITHOUT IN ANY MANNER LIMITING THE FOREGOING, this agreement is not and is not to be deemed to be evidence of or an admission of liability on the part of the NW

or CONRAIL, but constitutes a compromise in settlement of a disputed claim.

FURTHER, WITHOUT IN ANY MANNER LIMITING THE FOREGOING, this covenant is expressly intended to and does include any and all claims which the said SHIRLEY JOYCE ANDERSON may now or hereafter have or assert for loss of services, companionship, consortium, medical, hospital, nursing and pharmaceutical expense arising out of, relating to or resulting from the aforesaid association or employment of LESTER ANDERSON at the NW or CONRAIL.

IT IS FURTHER AGREED AND UNDERSTOOD without any limitation on the foregoing that this agreement includes on behalf of LESTER ANDERSON his successors and assigns any claim, demand, right or cause of action for injuries, losses and damages resulting from or relating in any manner to exposure to or ingestion of any substance whatsoever including but not limited to asbestos dust or fiber and any diseases resulting therefrom as well as asbestosis or asbestos-related disease, illness or injury including any and all forms of cancer or mesothelioma, claimed to be related to asbestos or any other substance whether or not presently alleged or manifested.

AS FURTHER INDUCEMENT TO THE NW AND CONRAIL to enter into this agreement, LESTER ANDERSON and SHIRLEY JOYCE ANDERSON hereby represent to the NW AND CONRAIL that no person or insurance company has any right or has asserted any right of subrogation, under any policy or insurance or otherwise on account of any medical, hospital, nursing or other expense for or on account of any of the injuries, losses and damages which are the subject matter of this agreement.

ANY OF THE FOREGOING TO THE CONTRARY NOT WITHSTANDING LESTER ANDERSON, and SHIRLEY JOYCE ANDERSON individually and as husband and wife, together with their successors and assigns, do not intend the consideration paid hereunder to represent a complete satisfaction of all claims, demands, rights and causes of action which they may now or hereafter have to assert against the remaining defendants in the PENDING CASE or other possible defendants including miners, millers, or processors of asbestos fiber and/or manufacturers of asbestos-containing products or any of them, and hereby expressly reserve all claims, demands, rights and causes of action of whatsoever kind, nature or description which they may now have or hereafter have or assert against the remaining defendants in the PENDING CASE and other possible defendants including miners, millers or processors of asbestos fiber and/or manufacturers of asbestos-containing products, their predecessors, successors, agents or assigns, or any of them, arising out of or relating in any manner to the injuries, losses and damages described in the pleadings and documents filed in the PENDING CASE.

IT IS FURTHER AGREED AND UNDERSTOOD that LESTER ANDERSON and SHIRLEY JOYCE ANDERSON both collectively and individually shall indemnify the NW AND CONRAIL and hold it harmless from loss or liability, on account of any claims, demands, rights or causes of action or loss to any other person, firm, association, or corporation asserting any independent or derivative claim or right, whether by common law, statute, contract or otherwise, including without limitation, actions for contribution, indemnity or subrogation for or on account of the injuries, losses and damages which are the subject matter of this agreement.

THIS COVENANT SHALL OPEATE AS AUTHORITY for the NW or its counsel to cause an entry to be made in the

PENDING CASE, said entry to read: "Complaint as to defendants Norfolk & Western Railway Co. and Conrail, dismissed with prejudice."

THIS AGREEMENT SHALL BE CONSTRUED in accordance with the laws of the State of Ohio.

IN WITNESS WHEREOF, we have hereunto set our names to five duplicate originals of the foregoing Covenant this 26th day of March, 1986, after the said Covenant has been read over and fully explained to us by our counsel of record.

SIGNED IN THE PRESENCE OF:

/s/ [illegible]
/s/ [illegible]

/s/ Lester Anderson
LESTER ANDERSON

/s/ [illegible]
/s/ [illegible]

/s/ Shirley Joyce Anderson
SHIRLEY JOYCE ANDERSON

CERTIFICATE

I HEREBY CERTIFY that on the day and year above specified I read the foregoing Covenant not to Sue and to Cease Suing to LESTER ANDERSON and SHIRLEY JOYCE ANDERSON; that I explained to each the legal consequences of the execution and delivery of said agreement and that each executed the same voluntarily and appeared to have full knowledge of the contents thereof.

Dated this 26th day of March, 1986.

/s/ [illegible]
Attorney for Andersons

(2)

AUG 30 2004

No. 04-144

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
NORFOLK SOUTHERN RAILWAY CO.,
and NORFOLK SOUTHERN CORPORATION,

Petitioners,

v.

SHIRLEY ANDERSON, Individually and as
Executrix of the Estate of Lester Anderson, deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF OHIO,
EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a general release attempting to limit a railroad's future liability for any and all injuries, known and unknown, is void under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 55, and thus cannot prevent an action for a separate injury to proceed that had not accrued at the time of the execution of the release.

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STATUTE INVOLVED

Congress enacted 45 U.S.C. § 5 (now § 55) of the FELA to prevent railroads from obtaining blanket waivers of liability for their harmful acts. 45 U.S.C. § 55 provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.

Id.

In order for a release to be valid pursuant to § 55, a railroad carrier must not intend to exempt an employer from liability under the FELA but it must be a means of compromising a claimed liability of an existing controversy. *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 631 (1948). The application of § 55 to a release is a fact-bound analysis. *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 700 (3d Cir. 1998), *cert. denied*, 525 U.S. 1012. Furthermore, Congress' intent in passing the FELA was "to provide liberal recovery for injured workers." *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). Moreover, viewing 45 U.S.C. § 55 liberally, as required, Congress intended it to have the "full effect that its comprehensive phraseology implies." *Id.* at 701 (*quoting Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263 (1949)).

INTRODUCTION

Lester Anderson worked for the Nickel Plate Railroad Company from 1940 until 1961 as a sheet metal worker and pipe fitter. Mr. Anderson briefly left the railroad to serve in the United States Navy from 1944 to 1946. In 1961, Mr. Anderson began working at the New York Central Railroad Company as a sheet metal and maintenance worker until he left in 1964. Mr. Anderson worked with numerous asbestos-containing products during his employment with the two railroad companies, including insulation, packing, and gaskets.

In 1983, Mr. Anderson was diagnosed with the disease asbestosis. Asbestosis is a non-malignant scarring of the lungs caused by exposure to asbestos fibers. On November 20, 1984, Mr. Anderson brought suit against several parties, including the Petitioners herein, for damages incurred as a result of his asbestosis. On March 26, 1986, Lester and Shirley Anderson entered into a settlement agreement with the Defendants and signed a general, boiler-plate release, thereby terminating the litigation as to the Petitioners and disposing of Mr. Anderson's claim against them for asbestosis. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 25a.

On January 9, 1998, Lester Anderson was diagnosed with pleural mesothelioma. Pleural mesothelioma is manifested as malignant tumors in the lining of the lungs. Mesothelioma is an extremely rare and incurable form of cancer which is caused by an individual's exposure to asbestos fibers. Mr. Anderson ultimately succumbed to his mesothelioma and passed away on April 9, 1998.

STATEMENT OF THE CASE

On March 29, 2000, Respondent, Shirley Anderson, individually and as Executrix of the Estate of Lester Anderson, brought suit against multiple parties seeking damages for the personal injury and wrongful death of her husband Lester Anderson as a result his contracting the disease mesothelioma, due to his occupational exposure to asbestos and asbestos-containing products. Lester Anderson was exposed to asbestos and asbestos-containing products in the scope and course of his employment with Defendants and/or their predecessor railroads.[1]

At the trial court and appellate levels, Petitioners claimed that Respondent's wrongful death and survival claims based on Mr. Anderson's death by mesothelioma were barred by the 1986 release from Mr. Anderson's asbestosis claim. The general, boiler-plate release signed by the Andersons in 1986 released the Petitioners from "any claims * * * of whatever kind" relating to Lester Anderson's employment that he "may now have or hereafter have * * * * relating in any manner to exposure to or ingestion of any substance whatsoever." Pet. App. at 25a. The Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County ("Eighth Appellate District"), however, held that the 1986 general release was void because it violated § 55 of the FELA, which explicitly precludes railroad employers from utilizing releases to avoid future liabilities for injuries to their employees. The Supreme Court of Ohio denied Petitioners' discretionary appeal of the decision of the Eighth Appellate

1. The Norfolk Defendants are sued as successors in interest to the Nickel Plate Railroad Company. American Financial Group, Inc. is sued as a successor in interest and/or liability to New York Central Railroad.

District, and a subsequent motion for reconsideration. Thereafter, Petitioners filed this Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

Petitioners claim that this Honorable Court should grant their Petition for Writ of Certiorari because the decision of the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County ("Eighth Appellate District") is: (1) in direct conflict with United States Supreme Court precedent; (2) represents a conflict among the lower courts concerning the validity of FELA releases; and (3) it will further extend the already over-burdened asbestos docket, undermine incentives to settle claims and lead to forum shopping. Each of these contentions is without merit.

Quite simply, this case involves a release, drafted by the Petitioners, signed by the Respondent and her deceased husband, that impermissibly attempted to limit Petitioners' liability as railroad employers under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq*. This case involves a contract dispute between the parties to the release and as such is highly fact determinative.

The specific section of the FELA at issue herein is 45 U.S.C. § 55 which explicitly precludes railroad employers from utilizing releases to avoid future liabilities for injuries to their employees. The Eighth Appellate District properly held that the specific release at issue herein was void because it violated § 55 of the FELA.

As discussed more fully below, the decision of the Eighth Appellate District does not conflict with United States

Supreme Court precedent. Likewise, as discussed more fully below, the decision does not represent a conflict among the lower courts concerning the validity of FELA releases. Furthermore, Petitioners' concern with causing a floodgate of asbestos cases is purely speculative and without merit. In fact, mesothelioma is a rare disease that occurs only in a very small percentage of those individuals who were exposed to asbestos.

The decision of the Eighth Appellate District merely addressed the validity of the particular release entered into by the Respondent and the Petitioners herein. As such, the decision of the Eighth Appellate District will not lead to an innundation of claims with the courts. The decision merely follows the law already established by the FELA and the cases interpreting it.

With respect to undermining the incentive to settle work-related claims, Congress, in enacting § 55 of the FELA, explicitly foreclosed the railroads' ability to limit their liability *vis a vis* workers' rights to recover for injuries sustained while working on the railroads. As discussed below, Congress, in enacting § 55, determined that the protection of railroad workers outweighed the railroad employers' ability to negotiate immunity for future liabilities.

The Eighth Appellate District decision properly limited the scope of the release herein and its broad, sweeping language. It does not conflict with existing United States Supreme Court precedent, indicate a split among the lower courts, create a danger of a run on the courts, forum shopping or multiple recoveries. Furthermore, the decision does not change any substantive law, nor does it create new avenues of recovery for claimants. It merely enforces the express provisions of the FELA which prohibit railroads from using releases to obtain blanket waivers of liability.

A. The Decision Of The Court Of Appeals Of Ohio, Eighth Appellate District, Cuyahoga County Is Not In Conflict With United States Supreme Court Precedent.

Petitioners claim that the Eighth Appellate District, by holding that the release is void because it violated 45 U.S.C. § 55, attempted to overrule the United States Supreme Court's decisions in *Mellon v. Goodyear*, 277 U.S. 335 (1928) and *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 631 (1948). As shown below, however, the decision of the Eighth Appellate District does not conflict with or run afoul of either case.

Mellon does not have any application to this case. The holding in *Mellon* was based on its interpretation of 45 U.S.C. § 59, which provides:

> [a]ny right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, **but in such cases there shall be only one recovery for the same injury.** (Emphasis added).

45 U.S.C. § 59.

As the statute plainly provides: "there shall be only one recovery for the same injury." *Id.* In determining the right of a survival action, the emphasis should be on the injury. In *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59, 70 (1913). As the *Vreeland* court stated, "the foundation of the right of action is the original wrongful injury to the decedent, * * *

the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." *Id.*; *see also Mellon*, 277 U.S. at 344.

In *Mellon*, the decedent settled his personal injury action with his railroad employer prior to his death. Then his widow tried to bring a survival action based on the *same injury*. The *Mellon* court held that this survival action was barred because the decedent had already recovered in the personal injury claim for that same injury.

The facts of the instant case are distinguishable from *Mellon* and any reliance on *Mellon* herein is misplaced. Lester Anderson's mesothelioma claim involves a separate and distinct injury from the injury claimed in his asbestosis case. Lester Anderson signed a release as part of his personal injury claim for asbestosis. But, this case involves mesothelioma, a separate and distinct injury from asbestosis.[2] Unlike the decedent in

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2. Asbestosis and mesothelioma are separate and distinct diseases. Cancer is a separate disease process from asbestosis. *See Norfolk & Western v. Ayers*, 538 U.S. 135, 174 (2003) (Kennedy, J., dissenting in part); *Lavelle v. Owens-Corning Fiberglass Corp.*, 507 N.E.2d 476, 479 (Ohio Com. Pl., 1987). Asbestosis is a noncancerous scarring of the lungs caused by breathing asbestos fibers. *Norfolk & Western v. Ayers*, 538 U.S. 135 (2003). Mesothelioma, by contrast, "is a rare malignant tumor of the mesothelium of the pleura [lining of the lungs] or peritoneum [lining of the abdominal wall], associated with exposure to asbestos." *See* Mosby's Medical, Nursing & Allied Health Dictionary 1016 (5th ed. 1998). Mesothelioma is a cancerous process; asbestosis is not. Asbestosis and mesothelioma progress independently of each other. Mesothelioma is not an outgrowth or a progression of asbestosis. The vast majority of individuals diagnosed with asbestosis never contract mesothelioma. They are separate and distinct diseases.

Mellon, Lester Anderson had a right immediately before his death to have maintained an action for his wrongful injury, *i.e.*, mesothelioma. Therefore, the *Mellon* analysis is not applicable to Respondent's claim because her claim is not contrary to 45 U.S.C. § 59.

In addition, the *Mellon* court did not even address 45 U.S.C. § 55, the FELA section central to Respondent's claim herein. As shown below, the release signed in 1986 is void as to Mr. Anderson's mesothelioma claim and the general exemptions contained therein because it contravenes 45 U.S.C. § 55. Accordingly, *Mellon* is not relevant in this case.

Petitioners also claim that the decision of the Eighth Appellate District herein impermissibly conflicts with *Callen*, *supra*. In *Callen*, a railroad brakeman, filed a FELA action after injuring his back during the course of his employment with the railroad. The plaintiff brakeman had previously signed a general release and settled the claim in consideration for $250. The general release released "all claims and demands which I have or can or may have against the said Pennsylvania Railroad Co. for or by reason of personal injuries sustained by me." *Callen*, 332 U.S. at 626.

When he signed the release, however, the plaintiff in *Callen* was not aware that his back injury was permanent. The plaintiff in *Callen* brought his FELA claim for this permanent back injury.

The primary issue on appeal in *Callen* was whether the trial judge had improperly withdrawn the question of the validity of the release from the jury. The Court held the trial judge had erred by not allowing the jury to determine the

validity of the release. In the second to last paragraph of its opinion, the *Callen* Court also addressed whether the release violated § 5 (now § 55) of the FELA. In determining whether the release at issue violated § 5 of the FELA, the Court in *Callen* states only that:

> [i]t is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Callen, 332 U.S. at 630.

From these two sentences, Petitioners herein claim that *Callen*, coupled with *Mellon*, "establish that general releases that are executed after the alleged wrongful act in settlement of a claim do not offend the FELA's prohibition against liability exemptions, even if the cause of action has not yet accrued." Petition for a Writ of Certiorari ("Pet.") at 2. Petitioners' claim demonstrates a flawed reading and application of *Callen* and *Mellon*. Further demonstrating their lack of understanding of the *Callen* decision, Petitioners claim that "*Callen* makes clear that where there is a specific injury claim, a bona fide compromise of that claim–including a release of all future claims known or unknown–the release is valid under the FELA." Pet. at 13. But the *Callen* Court simply found that "Congress has not said that parties may not settle their claims without litigation." *Callen*, 332 U.S. at 631. The *Callen* Court did not, in any way, determine that all releases under the FELA are *per se* valid. In fact, if anything, *Callen* made clear only that the

validity of the specific release at issue in that case was a question of fact for the jury to consider. *Id.* at 629.

Furthermore, the Court in *Callen* did not explain what it meant by the phrase that a release "is a means of compromising a claimed liability" or by the phrase "[w]here controversies exist as to whether there is liability." *Id.* at 630. Nowhere in its decision does the *Callen* Court state, or even suggest, as the Petitioners would have this Court believe, that a release for a separate and distinct injury that attempts to exempt the railroad from any and all injuries, known or unknown, whatever the cause, is a valid release under the FELA. Nor does the *Callen* Court state, or suggest, as the Petitioners would have this Court believe, that general releases can be valid for injuries that have yet to accrue.

Callen held that a railroad carrier must not intend to exempt an employer from liability under the FELA but it must be a means of compromising a claimed liability of an existing controversy. The decision of the Eighth Appellate District does not conflict with *Callen*; it merely analyzed the language of the release to determine whether it represented a permissible compromise of a claimed liability of an existing condition, per *Callen*, or whether it was the type of "device" intended to exempt the railroad from liability that is prohibited by 45 U.S.C. § 55.

The decision of the Eighth Appellate District was proper. The Court correctly analyzed the language of the release, and correctly applied this Court's precedent and § 55 of the FELA. The decision did not deviate from, or even call into doubt, this Court's decisions in *Callen* and *Mellon*.

B. The Decision Of The Court Of Appeals Of Ohio, Eighth Appellate District, Cuyahoga County Does Not Represent A Conflict Among The Lower Courts Concerning The Validity Of FELA Releases.

Petitioners further claim that the decision of the Eighth Appellate District represents a mature split among the federal circuit courts concerning the standards to apply to liability release under the FELA. Specifically, Petitioners claim that the Sixth Circuit's "bright-line rule" found in *Babbitt v. Norfolk & Western Railway Company*, 104 F.3d 89 (6th Cir. 1997), is in conflict with the Third Circuit's "approach" found in *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690 (1998), *cert. denied*, 525 U.S. 1012.[3] But, as demonstrated below, this so-called split is artificial and is irrelevant to the case herein as the decision of the Eighth Appellate District would have been the same regardless of which "approach" it utilized.

In fact, the United States Court of Appeals, Third Circuit, in *Wicker* explains that United States Supreme Court decisions dealing with the validity of releases under the FELA are highly fact determinative; and therefore, the United States Supreme Court does not provide a general rule of law in these cases. Specifically, *Wicker* provides:

> rejecting general releases as bars to subsequent claims have been fact-driven, and consequently do not provide a generally applicable rule of law. Although the Supreme Court in *Callen* refused to void the releases executed in compromise of an

3. This Court has previously denied a petition for writ of certiorari filed by Consolidated Rail Corp. in the *Wicker* case. *Consolidated Rail Corp. v. Wicker*, 525 U.S. 1012 (U.S. Nov 16, 1998) (No. 98-193).

> employee's claims, the Court has not had occasion to explain how wide a net its ruling casts.

Wicker, 142 F.3d at 698. In reaching its decision herein, the Eighth Appellate District conducted a proper factual analysis of the claim, and properly determined that the release in question in this particular case was void because it violated § 55 of the FELA.

As *Wicker* makes clear, the application of § 55 to a release is a fact-bound analysis. *Wicker*, 142 F.3d at 700. Furthermore, because these cases are highly fact determinative, the United States Supreme Court has correctly denied to apply a rigid set of rules. Although this absence of a rigid set of rules may lead to some confusion, no such confusion is evident in the decision of the Eighth Appellate District.

Babbitt, *supra*, is the Sixth Circuit case that contains the so-called "bright-line rule." In *Babbitt*, the defendant claimed that its release as part of a "Voluntary Separation Program" (wherein the employees agreed to resign from the company in exchange for a lump sum settlement) served to "buy its peace" from the plaintiffs by getting them to agree to execute a **release of all claims, known and unknown, for which the company may ever be held liable.** *Babbitt*, 104 F.3d at 91 (Emphasis added). The plaintiffs, on the other hand, claimed that the release was void because it violated 45 U.S.C. § 55. The court agreed with the plaintiffs.

In its analysis of the *Callen* decision, the *Babbitt* court determined that a release is valid only when it settles an actual controversy for a plaintiff's specific injuries. *Babbitt*, 104 F.3d at 92. According to *Babbitt*:

> However, where the release was not executed as part of a specific settlement of FELA claims, 45 U.S.C. § 55 precludes the employer from claiming the release as a bar to liability. [Citation omitted.] To be valid, release must reflect a a [sic] bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him.

Id. at 93.

The Babbitt court's analysis of *Callen* and § 55 of the FELA is correct and wholly consistent with the language of both. The FELA, in § 55, clearly precludes a railroad employer from using a release to bar itself from future liability. *Callen* held that a railroad carrier must not intend to exempt an employer from liability under the FELA but it must be a means of compromising a claimed liability of an existing controversy.

Furthermore, although *Wicker* refused to adopt the so-called "bright-line rule" adopted by the Sixth Circuit in *Babbitt*, *Wicker*'s approach to analyzing § 55 of the FELA does not represent a split among the circuits. In fact, the *Wicker* court found the releases at issue in that case violated § 55 of the FELA and were therefore invalid. Likewise, in the case herein, the result would be the same under either the Sixth Circuit *Babbitt* "approach" or the Third Circuit *Wicker* "approach."

Even though *Wicker* may allow an employee to release a claim for a known risk, it still cautioned the trial court to

carefully examine the release to ensure it does not violate § 55 of the FELA. Petitioners want this Court to believe that *Wicker* and those cases following the *Wicker* "rule" provide that releases under the FELA are *per se* valid. That is not the case however. As *Wicker* expressly provides:

> we conclude that **a release** may be strong, but **not conclusive, evidence** of the parties' intent. * * * * Furthermore, **where a release merely details a laundry list of diseases or hazards, the employee may attack that release as boiler plate, not reflecting his or her intent.** (Emphasis added).

Wicker, 142 F.3d at 701.

In fact, the Eighth Appellate District, in its analysis, found that the release herein was boiler plate and merely detailed a laundry list of diseases and, like the *Wicker* court, determined the release was invalid.[4] Specifically, the Eighth Appellate District, in discussing the first paragraph of the release herein, stated:

> [t]hus, it is apparent from the plain language of the release that the intent of the release was to exempt appellees from all potential liability related to Lester Anderson's employment. Indeed, appellee American Financial Group admits that 'the original intent of

4. Petitioners claim that the Eighth Appellate district relied on a flawed reading of *Fannin v. Norfolk & W. Ry. Co.*, 666 N.E.2d 291 (Ohio App. 9 Dist. 1995) in reaching its decision. But the *Fannin* court's reading of *Callen* is wholly supportable since *Callen* makes clear that releases are only valid only "where controversies exist." Pet. App. at 11a-12a (*quoting Fannin*, 666 N.E.2d at 295).

> the release was indeed to release any and all future claims.' [citation omitted].

Pet. App. at 10a. Furthermore, the Eighth Appellate District court stated:

> [t]his broad language [of paragraph three, page two of the release] is clearly not a bargained-for settlement of only Anderson's asbestosis claim and injuries related to that claim. Reading this language in conjunction with the very broad language of the first paragraph of the release, it is apparent that the release goes well beyond merely compromising a claimed liability and impermissibly purports to exempt [the railroad] from all 'potential future claims the employee might have arising from injuries known or unknown by him.' *Babbitt*, 104 F.3d at 93.

Pet. App. at 13a.

The release signed by Lester and Shirley Anderson in no way represents a "bargained-for settlement of a known claim for a specific injury." *Babbitt*, 104 F.3d at 93. It actually seeks to do what the *Babbitt* court specifically prohibits: "extinguish potential future claims the employee might have arising from injuries known or unknown." *Id.*

Specifically, the release in paragraph one attempts to waive **"any claims * * * of whatever kind"** relating to Lester Anderson's employment that he **"may now have or hereafter have."** (Emphasis added). In addition, in paragraph two, the release provides that Shirley and Lester Anderson "release and forever discharge" any damages associated with "any other action be determined to be caused" by the Petitioners.

Moreover, paragraph five provides that

> **this agreement includes on behalf of LESTER ANDERSON * * * any claim,** demand, right or cause of action **for injuries**, losses, and damages resulting from or **relating in any manner to exposure to** or ingestion of **any substance whatsoever** including but not limited to asbestos dust * * * **including mesothelioma * * * whether or not presently alleged or manifested.**

(Emphasis added).

Although Petitioners specifically mention mesothelioma in the release, the phrase "whether or not presently alleged or manifested" in paragraph five of the release demonstrates the Petitioners intent to impermissibly limit their liability for future claims, such as mesothelioma, which did not accrue at the time of the release. Furthermore, other language in the release expands its application to **"any claim"** related to asbestos exposure or any other substance, including claims not yet manifest. This broad language does not attempt to reach a bargained-for settlement for a known claim for a specific injury. Instead it impermissibly attempts to exempt the Petitioners' liability for any claim that may lead to any type of injury.

Therefore, the Eighth Appellate District, in conducting its fact-drive analysis, as required, determined the release herein was void because it violated § 55 of the FELA. The result would have been the same under the *Wicker* "approach" or the *Babbitt* "approach." Even if there is split among the federal circuit courts in their "approach" to analyzing releases, any such split is irrelevant and would not result in inconsistent rulings based on the facts of this particular case.

C. The Decision Of The Eighth Appellate District Will Not Further Extend The Already Over-Burdened Asbestos Docket, Undermine Incentives To Settle Claims Or Lead To Forum Shopping.

It is important to note that mesothelioma is "a rare malignant tumor of the mesothelium of the pleura [lining of the lungs] or peritoneum [lining of the abdominal wall], associated with exposure to asbestos." *See* Mosby's Medical, Nursing & Allied Health Dictionary 1016 (5th ed. 1998). Fortunately, only a small fraction of people exposed to asbestos develop mesothelioma. *See* Carbone, M., Kratzke, R.A., Testa, J.R. *The Pathogenesis of Mesothelioma*. Semin. Oncol. 29:2-17, 2002. Furthermore, "[t]here is no demonstrated causal link between asbestosis and cancer." *Ayers*, 538 U.S. 135 at 172 (Kennedy, J., dissenting in part).

Since only a small percentage of individuals who have been exposed to asbestosis actually contract mesothelioma, and an incidence of asbestosis is not casually linked with an incidence of mesothelioma, Petitioners' concern with causing a floodgate of asbestos cases is purely speculative and without merit. Petitioners present no evidence regarding the number of claims it has settled, the circumstances surrounding those releases, or any other evidence that could lend support to their outlandish statement that "[t]he rule adopted [by the Eighth Appellate District] casts thousands (and perhaps tens of thousands) of existing FELA settlements in to doubt and invites forum shopping." Pet. at 4.

The decision of the Eighth Appellate District merely addressed the validity of the particular release entered into by the Respondent and the Petitioners herein. As such, the decision of the Eighth Appellate District will not lead to an

innundation of claims with the courts. The decision merely follows the law already established by the FELA and the cases interpreting it.

Petitioners also claim, again without any evidence in support, that the ruling of the Eighth Appellate District "injects tremendous uncertainly into settlement process prospectively." Pet. at 4. But, Congress, in enacting § 55 of the FELA, explicitly foreclosed the railroads' ability to limit their liability *vis a vis* workers' rights to recover for injuries sustained while working on the railroads. Congress, in enacting § 55, determined that the protection of railroad workers outweighed the railroad employers' ability to negotiate immunity for future liabilities.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 04-144

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
NORFOLK SOUTHERN RAILWAY CO., AND
NORFOLK SOUTHERN CORPORATION,

Petitioners,

v.

SHIRLEY ANDERSON,

Respondent.

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REPLY BRIEF

The petition demonstrates that the decision below on the scope of § 5 of the Federal Employers' Liability Act (FELA) contravenes this Court's decisions in *Callen* v. *Pennsylvania Railroad*, 332 U.S. 625 (1948), and *Mellon* v. *Goodyear*, 277 U.S. 335 (1928). Pet. 12-16. It further shows that there is now an acknowledged 2-1 split in the federal courts of appeals, with multiple state appellate courts on both sides of the divide, over whether FELA plaintiffs may settle only an "accrued claim for a known injury," as the court below ruled (Pet. App. 12a). Pet. 16-21. Respondent's distinctions of *Callen* and *Mellon* are unavailing. Those decisions hold that a general release of claims in settlement of litigation is valid under § 5, regardless of whether the full extent of the injury from a tortious act is known at the time, and whether or not the released claim has accrued. Moreover, respondent's denial of the circuit split (which is based on a profound misreading of the cases) founders on the state court's direct acknowledgement of that conflict below. Finally, it defies logic for respondent to claim that the inability of parties to negotiate a comprehensive settlement of asbestos liability – especially, cancer claims (which are not limited to mesothelioma) – will have no effect on the efficient settlement of asbestos cases, which is the only mechanism that in any fashion operates to relieve court dockets that are clogged with asbestos claims. Because "the scope of § 5 is of fundamental importance in the administration of the Federal Employers' Liability Act," *Duncan* v. *Thompson*, 315 U.S. 1, 5 (1942), and because "[a] uniform application" of FELA "throughout the country is essential to effectuate its purposes," *Dice* v. *Akron, Canton & Youngstown Railroad*, 342 U.S. 359, 361 (1952), this Court should grant review to resolve the conflict of authority on this significant and recurring issue of federal law.

1. In *Callen*, this Court held that a general release that compromises a claim does not offend section 5 of FELA, 332 U.S. at 631, and in *Mellon*, this Court held that a valid prior release extinguishes an unaccrued cause of action for wrongful death, 277 U.S. at 345. Respondent's contrary analysis of this Court's precedents is rife with error.

Respondent turns first to *Mellon*, and begins by misstating the holding of that case. Respondent claims that *Mellon* "does not have any application to this case" because it only interpreted section 9 of FELA (45 U.S.C. § 59), which authorizes survival actions. Opp. 6. Respondent says that in *Mellon* the "widow tried to bring a survival action based on the *same injury*" that the decedent (Goodyear) had settled prior to his death, and this Court merely "held that this survival action was barred because the decedent recovered in the personal injury claim for that same injury." *Id.* at 7.

That is wishful thinking. The widow in *Mellon* brought a *different* cause of action that (like respondent's claim here) had not accrued at the time the general release was executed: namely, a wrongful death action under section 1 of FELA, 45 U.S.C. § 51, not a survival action under section 9. Her contention was that "the beneficiaries had a *separate cause of action* for their pecuniary damage which the decedent could not release." 277 U.S. at 337 (emphasis added). This Court, after noting that "[o]bviously" any survival action under section 9 was extinguished by the release, stated that the widow "must recover, if at all, under § 1, Act of 1908, which imposes liability for pecuniary loss sustained by dependents through death." *Id.* at 343.

The Court went on to hold that the settlement extinguished even the separate and unaccrued wrongful death action. Goodyear had released the railroad "'from any and all liability for all claims and demands for all damages resulting from the injuries received by me at the time and place above stated, including such injuries as may hereafter develop as well as those now apparent,'" and including "'resulting

death.'" *Id.* at 337. Because "'the gist and foundation of the right in all cases is the wrongful act,'" this Court held that "the settlement and release relieved the [railroad defendant] from all liability for damages consequent upon the injuries received by Goodyear and his death." *Id.* at 345.

Respondent tries to wriggle free from the holding of *Mellon* by characterizing mesothelioma as "a separate and distinct injury" from asbestosis. Opp. 7. This is a confusion of terms. Mesothelioma, and cancer generally, may indeed involve a "separate disease process" from asbestosis, *id.* 7 n.2, but that does not make cancer a separate "injury" as that term is used in tort law and in sections 1 and 9 of FELA. "Injury" is an "invasion of any legally protected interest." *Restatement (Second) Of Torts* § 7(1) (1965). Asbestos exposure is the invasion of the plaintiff's interest in bodily freedom from toxic agents, and this Court has held that this interest receives legal protection (*i.e.*, is actionable) when the exposed person manifests asbestos-related disease. *Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424, 427 (1997). The development of cancer is not a new "injury" under FELA, *i.e.*, there was no separate "invasion" by Norfolk Southern of any interest of the plaintiff at that time. Rather cancer is a consequential physical harm from the same wrongful act. *Restatement (Second)* § 7(2) (distinguishing "injury" from "harm," and defining the latter as "a loss or detriment in fact").

Mellon makes clear that a single "injury" may give rise to multiple harms and separate causes of action, but that does not affect the validity or force of a release. Death is a separate harm from the harms (physical and emotional) the decedent suffered while living. In authorizing wrongful death actions, Congress created "'distinct and independent liabilities'" from those that may be recovered through a direct action by the injured party. *Mellon*, 277 U.S. at 340 (quoting *Michigan Central R.R.* v. *Vreeland*, 227 U.S. 59, 65 (1913)). But those distinct liabilities nonetheless have "'the common foundation'" of "'the original wrongful injury to the

decedent,'" *id.* at 340-41 (quoting *Vreeland*, 227 U.S. at 65, 70), and therefore may be extinguished by release, *id.* at 345.

This same rule governs asbestos-cancer claims. Courts applying the two-action rule have recognized claims for mesothelioma and other cancer as "distinct and independent liabilities." See Pet. 15. But the judicially created two-action rule does not presuppose that cancer is a separate "injury." To the contrary, it recognizes that cancer flows from the same injury as asbestosis, which is why under traditional common law a plaintiff was required to seek damages for asbestosis and cancer in the same action. *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 119-20 (D.C. Cir. 1982) (Ginsburg, J.). Courts that have adopted the two-action rule have done so because they regarded the common law rule against claim-splitting as unfair to asbestos plaintiffs, given the long latency periods of asbestos-related cancer. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 174 (2003) (Kennedy, J., concurring in part and dissenting in part). But, given that mesothelioma claims, like the wrongful death claim at issue in *Mellon*, are founded on the "'same wrongful act'" (negligence resulting in injury), the plaintiff's express release of these distinct liabilities for cancer in settling his original claim must be upheld. Respondent – who fails even to address this analysis where set forth in the Petition (pp. 15-16) – is correct that "[i]n determining the right of a survival action, the emphasis should be on the injury." Opp. 6. But respondent fails to recognize that focus on the injury is fatal to her claim. Under *Mellon*, a general release extinguishes even unaccrued claims arising from the same wrongful act.

2. The same misconceptions plague respondent's analysis of *Callen*.[1] In *Callen*, this Court upheld against a section 5

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[1] Respondent also misstates the relevant holding of *Callen*. In an attempt to claim that *Callen* established no rule of law but only resolved factbound questions regarding a particular release, respondent argues that "if anything, *Callen* made clear only that the validity of the specific

challenge a general release for "'all claims and demands which [plaintiff] ha[s] or can or may have against [the railroad]'" arising out of the accident, 332 U.S. at 626-27, even though at the time the plaintiff executed the general release, he had not been diagnosed with, and was *unaware* that he had sustained, a permanent back injury. *Id.* at 627. Subsequently, when the plaintiff sought damages under FELA for a severe and permanent back injury, this Court upheld the general release:

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Id. at 631. The fact that the employee did not know he had a permanent back injury (just as Lester Anderson did not know of his cancer) was irrelevant to the validity of the release.

Callen cannot be reconciled with the state court's holding below that under the FELA "a release is valid only where it disposes of an accrued claim for a known injury," Pet. App. 12a. Respondent attempts to shield the lower court's holding by misconstruing *Callen*'s requirement that the release be in the context of a settlement ("[w]here controversies exist *as to whether there is liability.*" 332 U.S. at 631 (emphasis added)). According to respondent, FELA plaintiffs may release only claims for "existing *condition[s].*" Opp. 10. (emphasis added). *Callen* never says that; indeed as respondent concedes, the injury at issue in *Callen* was *unknown* at the time the release was executed. Opp. 8. More fundamentally,

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release at issue in that case was a question of fact for the jury." Opp. 9-10. That argument confuses two distinct holdings of *Callen.* The Court held that the question of whether the release was invalid because of mutual mistake was properly a question for the jury. 332 U.S. at 628-29. This Court resolved the separate question presented here – of whether section 5 of FELA forbade the general release – as a matter of law. *Id.* at 630-31.

the release executed by the Andersons in 1986, with the advice and consent of counsel, did resolve, fully and completely, the controversy of whether Anderson was injured by any wrongful act of asbestos exposure by the railroad. It matters not whether FELA allows one or two causes of actions to recover for that same wrongful act. "Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." *Callen*, 332 U.S. at 631.

Moreover, respondent (like the lower court) never squares the rule below with *Callen*'s holding that "until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others." *Id.* at 630. Respondent does not dispute that, outside of FELA, settlements with asbestos plaintiffs that release future cancer claims are perfectly valid, absent mutual mistake. The mutual-mistake doctrine only applies if there are "unknown injuries *that were not in the contemplation of the parties* when settlement was agreed upon." 66 Am. Jur. 2d *Release* § 21 (2001) (emphasis added); see also *id.* § 33 ("releases of rights which have not yet matured are valid and are self-operative, and they discharge the future rights or claims when they arise") (footnotes omitted); Michael A. DiSabatino, Annotation, *Modern Status of Rules as to Avoidance of Release of Personal Injury Claim on Ground of Mistake as to Nature and Extent of Injuries*, 13 A.L.R. 4th 686, 692 (1982) (for "belatedly appearing injuries, the outcome has tended to depend upon whether there was a sufficient indication of some significant injury prior to the release, so that the release could be said to be knowingly made"). There is no reason to have a different rule under FELA.

Despite respondent's unfounded protestations to the contrary, the ruling below, allowing both survival and wrongful-death actions to proceed even though they are predicated upon the same tortious conduct for which the

release was executed, is irreconcilable with *Callen* and *Mellon*, and should be reversed.

3. In siding with the Sixth Circuit to hold that FELA only permits general releases for "a known claim for a specific injury," *Babbitt* v. *Norfolk & Western Railway*, 104 F.3d 89, 93 (6th Cir. 1997), the decision below is in conflict with the rule of the Third and Eleventh Circuits (as well as other courts). Disavowing the *Babbitt* rule, those circuits hold that a FELA plaintiff may release future claims that expressly include "known risks even if there is no present manifestation of injury." *Wicker* v. *Consolidated Rail Corp.*, 142 F.3d 690, 701 (3d Cir. 1998); *Sea-Land Serv., Inc.* v. *Sellan*, 231 F.3d 848, 852 (11th Cir. 2000).

Respondent tries in vain to deny the circuit split, Opp. 11, 13, but her arguments founder on the express acknowledgement of that conflict by the court below (as well as by other courts, Pet. 17 n.7). The court below expressly stated that the *Babbitt* rule, which it adopted, departed from the rule of "the majority of courts." Pet. App. 13a. And, it specifically rejected *Wicker*'s "known-risk" rule, on which petitioner relied, because "[t]his is not the rule in the Sixth Circuit." *Id.* The court below properly understood its decision to side with the Sixth Circuit against the Third, and against other courts that follow *Wicker*.

Nonetheless, respondent attempts to whitewash the split by characterizing all issues related to FELA releases as "fact-bound" matters to which no "rigid set of rules" apply. Opp. 12. She bases that claim on a statement in *Wicker* that "'a release may be strong, but not conclusive evidence, of a parties' intent.'" *Id.* at 14 (emphasis in original omitted) (quoting *Wicker*, 142 F.3d at 701). But that passage in *Wicker* simply recognizes the well-established principle that parties can controvert the express language of a release on grounds of mutual mistake. 13 A.L.R.4th at 692 ("It has been widely held that the express language of the release is not conclusive, but rather that the courts will look to what was

actually within the contemplation of the parties at the time of the release in determining whether there was such a mistake as to justify avoidance.") (citation omitted). The question of whether a specific release is valid under a given rule may be fact-intensive. But the petition does not challenge any factbound application of an accepted rule. It challenges the rule of law that the court below (like the Sixth Circuit) has adopted in stark conflict with the majority rule.

The petition further demonstrates that Norfolk Southern would have prevailed under the *Wicker* rule. Pet. 20. The Andersons knew that, given Lester Anderson's asbestosis, he was at risk of contracting cancer; and with advice of counsel, they expressly released that claim for valuable consideration. *Id.* at 6-7, 20. Respondent answers with the *ipse dixit* that "[t]he result would have been the same under the *Wicker* 'approach,'" Opp. 16, but the only analysis she offers to support that implausible claim are quotations from the state court's application of the *Babbitt* rule. See *id.* at 15-16. Tellingly, the state court did not find the release invalid under *Wicker*; it expressly acknowledged that "Anderson may have been aware of the risk of developing mesothelioma as a result of his exposure to asbestos." Pet. App. 13a. The court simply found that analysis irrelevant because *Babbitt* permits releases only of accrued claims, not known risks: "because [Lester Anderson] did not have mesothelioma when he signed the release, his claim had not accrued and, therefore, he could not release it." *Id.*

Respondent also emphasizes the state court's disapproval of the blanket release of all employment-related claims in the first paragraph of the settlement agreement, Pet. App. 25a-26a. This argument is a red herring. In seeking this Court's review, petitioner does not rely on the first paragraph of the settlement agreement, but on the fifth paragraph that expressly releases asbestos-related claims (including mesothelioma and other cancers). See *id.* at 27a. This paragraph is a distinct and severable covenant. *Id.* ("IT IS

FURTHER AGREED AND UNDERSTOOD without any limitation on the foregoing"). Section 5 of FELA only voids a contract "to th[e] extent" it offends the prohibition on liability exemptions. 45 U.S.C. § 55. Thus, even if the covenant in the first paragraph were invalid – which it is not[2] – it would not affect the validity of the covenant in the fifth paragraph releasing mesothelioma and cancer claims.

In sum, this case cleanly presents a mature and acknowledged 2-1 split among the federal courts of appeals, with multiple state appellate courts on each side of the divide. This Court should resolve the conflict.

4. The petition demonstrates that the ability to negotiate comprehensive settlements of all asbestos-related liability (including claims for cancer that may manifest itself subsequently) is in the interests of FELA plaintiffs and defendants alike. It further demonstrates that the rule enforced below not only unfairly unsettles thousands of settlement agreements, but also injects uncertainty into the settlement process prospectively, which will only exacerbate the crowding of court dockets with "the elephantine mass of asbestos cases." *Ortiz* v. *Fireboard Corp.*, 527 U.S. 815, 821 (1999). See Pet. 21-24.

Respondent has no answer to any of this analysis. Respondent points out that only a "small percentage" of asbestos plaintiffs later contract mesothelioma. Opp. 17. But the rule adopted below does not *only apply* to claims involving mesothelioma. It casts a much broader net and would apply to any asbestos-related claim that can be the subject of a second action (including, most notably, the much

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[2] That recitation is perfectly legitimate in the context here (and in most asbestos cases, given that cancers often manifest themselves 30-40 years after exposure) where the plaintiff no longer works for the railroad. Anderson had not worked for the railroad for over 20 years when he brought his first claim, Pet. 5-6, and this paragraph prevents the regeneration of released claims in other guises.

more common claim that a plaintiff's lung cancer is exacerbated by asbestos exposure). Although precise numbers are not available, it is estimated that significantly more than 60,000 asbestos-related cancer claims have been filed to date nationally. See Stephen J. Carroll et al., RAND Inst. for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* 40, 46 (2002), *available at* http://www.rand.org/publications/DB/DB397/DB397.pdf. Indeed, the rule is not even asbestos-claim specific, and would apply in any occupational-exposure context to which courts may extend the two-action rule.

Moreover, it is not the filing of released cancer claims that will have the primary effect on court dockets; it will be the unwillingness of the parties to continue to settle nonmalignant asbestos claims, because railroads will not offer the same substantial consideration if future cancer claims cannot be released. Respondent does not deny the truth of this analysis, but disingenuously evades the question by faulting petitioner for not providing "evidence" to back up its analysis. Opp. 17. No such evidence is available; experienced plaintiff's counsel knows full well that railroads (including Norfolk Southern) keep settlement statistics confidential because disclosure compromises current negotiations over large blocks of cases. But suffice it to say that the total number of settlements are vast; it is Norfolk Southern's policy not to settle any asbestos claim without a cancer release; other railroads insist on such releases in all or some of their cases; and until this Court settles the circuit conflict, efficient settlement of asbestos claims is impossible. This Court should resolve this important and pressing conflict of authority now.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition should be granted.

Respectfully submitted,

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